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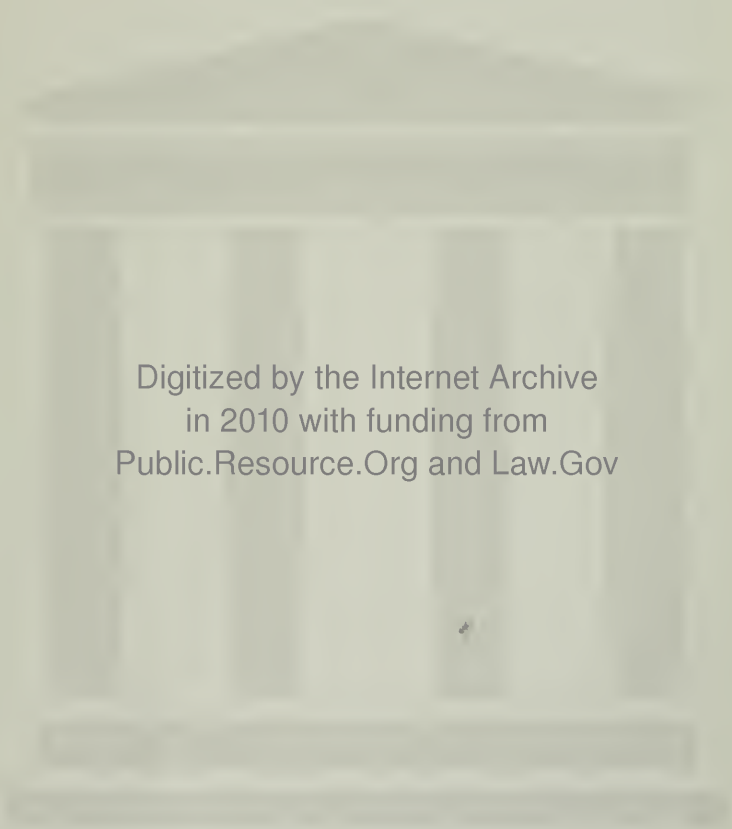
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055
No. 15812

United States
Court of Appeals
for the Ninth Circuit

FLORENCE UMBRIACO, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA, Appellant,

vs.

FLORENCE UMBRIACO, Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington, Northern Division

FILED

FEB 13 1958

PAUL P. O'BRIEN, Clerk

No. 15812

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for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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1903 Smith Tower,
Seattle 4, Washington,

Attorney for Appellant, Florence Umbriaco.

CHARLES P. MORIARTY and
MURRAY B. GUTERSON,

1012 U. S. Court House,
Seattle 4, Washington,

Attorneys for Appellee, United States of
America.

United States District Court, Western District
of Washington, Northern Division

No. 49660

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FLORENCE UMBRIACO,

Defendant.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about April 3, 1957, at Seattle, Washington, within the Northern Division of the Western District of Washington, Florence Umbriaco, having taken an oath before a competent tribunal in a case in which a law of the United States authorizes an oath to be administered, to wit, having taken an oath before the United States District Court for the Western District of Washington, Northern Division, in the case of United States of America v. Frank Peter Umbriaco, Western District of Washington, Northern Division, Criminal Case No. 49580, that she would testify and declare truly, did willfully and contrary to such oath state and subscribe material matters which she did not believe to be true, to wit, did state and subscribe that during the eight-month period from June 1952 to February 1953 she did not operate as

a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel in Seattle, Washington, when in truth and in fact she did operate as a prostitute at the Stewart Hotel in Seattle, Washington, during the eight-month period from June 1952 to February 1953 and she did perform acts of prostitution at the Stewart Hotel in Seattle, Washington, during the same period.

All in violation of Section 1621, Title 18, U.S.C.

Count II.

That on or about April 3, 1957, at Seattle, Washington, within the Northern Division of the Western District of Washington, Florence Umbriaco, having taken an oath before a competent tribunal in a case in which a law of the United States authorizes an oath to be administered, to wit, having taken an oath before the United States District Court for the Western District of Washington, Northern Division, in the case of United States of America v. Frank Peter Umbriaco, Western District of Washington, Northern Division, Criminal Case No. 49580, that she would testify and declare truly, did willfully and contrary to such oath state and subscribe material matters which she did not believe to be true, to wit, did state and subscribe that during the period from September 1954 to December 1955 she did not operate as a prostitute when in truth and in fact she did operate as a

prostitute during the period between September 1954 and December 1955.

All in violation of Section 1621, Title 18, U.S.C.

A True Bill.

/s/ ROBERT P. MOSER,

Foreman.

/s/ CHARLES P. MORIARTY,

United States Attorney.

/s/ MURRAY B. GUTERSON,

Assistant United States Attorney.

[Endorsed]: Filed April 10, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, Find the Defendant, Florence Umbriaco is guilty as charged in Count I of the Indictment; and further find the Defendant, Florence Umbriaco is guilty as charged in Count II of the Indictment.

Dated: Sept. 11, 1957.

/s/ M. SIDNEY REISS,

Foreman.

[Endorsed]: Filed September 11, 1957.

United States District Court, Western District
of Washington, Northern Division

Court Room No. 2, Monday, September 23, 1957.

Hon. William J. Lindberg, presiding.

No. 49660

[Title of Cause.]

MOTION DENIED

Now on this 23rd day of September, 1957, this matter comes on before the Court for hearing on motion of defendant for acquittal. The defendant is present with her counsel, John F. Evich. Murray B. Guterson, Assistant United States Attorney, appears for the Government.

The matter is called. Argument is had on motion of acquittal as to counts I and II. Thereupon the Court grants the motion of acquittal as to count I and denies the motion of acquittal as to count II.

Now the matter comes on before the Court for hearing on motion of defendant for a new trial. The matter is called and is denied.

Journal: Page #663.

United States District Court, Western District
of Washington, Northern Division

No. 49660

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FLORENCE UMBRIACO,

Defendant.

JUDGMENT AND COMMITMENT

On this 30th day of September, 1957 came the attorney for the government and the defendant appeared in person and by counsel, John F. Evich.

It Is Adjudged that the defendant has been convicted upon her plea of not guilty, and a verdict of guilty of the offense of violation of Section 1621, Title 18, U.S.C. as charged in Count II of the Indictment and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as to Count II and as to said Count II is convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Eighteen (18) Months in such institution as the Attorney General

of the United States or his authorized representative may by law designate on Count II of the Indictment.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in Open Court this 30th day of September, 1957.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney.

[Endorsed]: Filed and Entered Sept. 30, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Name and address of appellant: Florence Umbriaco, President Apartments, 1119 Olive Way, Seattle, Washington.

2. Name and address of attorney: John F. Evich, 1903 Smith Tower, Seattle, Washington.

3. Offense: Violation of Section 1621, Title 18, U.S.C.

4. Date of judgment: September 30, 1957.

5. Adjudged convicted upon the verdict of guilty of the offense of perjury in violation of Section

1621, Title 18, U.S.C. as charged in Count II of Indictment.

Adjudged that appellant be committed to custody of Attorney General for imprisonment for eighteen (18) months.

6. Admitted to bail:

I, John F. Evich, attorney for Florence Umbriaco, the above named appellant, do hereby appeal to the United States Court of Appeal for the Ninth Circuit from the above stated judgment for and on behalf of appellant.

Dated this 30th day of September, 1957.

/s/ JOHN F. EVICH,

Attorney for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed September 30, 1957.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Florence Umbriaco, as principal, and Michigan Surety Company, a corporation, organized and existing under the laws of the State of Michigan, as Surety, and doing business in the State of Washington and by virtue of the laws of the State of Washington, are held and firmly bound unto the United States of America, in the sum of Two Thousand Five Hundred Dollars (\$2500.00)

to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 30th day of September in the year of our Lord, One Thousand Nine Hundred and Fifty-seven.

The condition of the above recognizance is such, that, whereas, in the District Court of the United States for the Western District of Washington in a suit pending in said Court, between the United States of America vs. Florence Umbriaco, No. 49660, a judgment, sentence, commitment was entered as to said Florence Umbriaco, on September 30, 1957, and the said Florence Umbriaco, having filed in the Office of the Clerk of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and the said appeal being now regularly pending.

Now Therefore, if the said Florence Umbriaco, surrender herself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment be reversed and the cause be reversed and the cause be remanded for a new trial she appear in the Court to which said cause may be remanded for a new trial and render herself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed *a* construed to contain the "ex-

press agreement” for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court. As a further condition the defendant is prohibited from leaving the jurisdiction of this Court without authorization of the United States District Judge.

/s/ FLORENCE UMBRIACO.

[Seal] MICHIGAN SURETY COMPANY,

/s/ By WILLIAM G. HIMELHOCH,

Attorney-in-Fact.

Approved: September 30, 1957.

/s/ WILLIAM J. LINDBERG,

United States District Judge.

Approved the day and year first above written:

/s/ MURRAY B. GUTERSON,

Assistant United States Attorney.

Bail Bond Attached.

[Endorsed]: Filed September 30, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: United States of America, 1012 United States Courthouse, Seattle 4, Washington.

Name and address of appellant's attorneys: Charles P. Moriarty, United States Attorney, Western District of Washington, 1012 United States Courthouse, Seattle 4, Washington, and Mur-

ray B. Guterson, Assistant United States Attorney for said district, same address.

Offense: Violation of Section 1621, Title 18, U.S.C.

Concise statement of judgment or order, giving date: Appeal is from order dated September 23, 1957, granting defendant's motion for judgment of acquittal as to Count I following verdict of guilty by jury as to said Count I.

The undersigned, as counsel for the above-named appellant, United States of America, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated order.

Dated October 17, 1957.

/s/ CHARLES P. MORIARTY,
 United States Attorney,
 /s/ MURRAY B. GUTERSON,
 Assistant United States Attorney,
 Attorneys for Appellant.

[Endorsed]: Filed October 17, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Upon reading and filing the annexed stipulation herein, dated the 4th day of November, 1957,

It Is Ordered that the time of appellant to file the record of the appeal herein and to take all steps necessary to the prosecution of this appeal and to

docket the same, be and the same is hereby extended to and including the 15th day of December, 1957.

Dated this 4th day of November, 1957.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, and designations of counsel, I am transmitting herewith the following original papers in the file dealing with the action, including exhibits, as the record on the appeals herein of both plaintiff and defendant, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Indictment, filed April 10, 1957.

14. Verdict, filed September 11, 1957.

Minute entry of September 23, 1957 granting motion of defendant for judgment of acquittal as to Count I.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 49660

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FLORENCE UMBRIACO,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings had in the within-entitled and numbered cause, before a Petit Jury, duly empaneled, and the Honorable William J. Lindberg, a United States District Judge, at Seattle, Washington, commencing on the Tenth day of September, 1957, at 10:00 o'clock a.m. [1]*

Appearances: Murray B. Guterson, Assistant United States Attorney, Western District of Washington, Tenth Floor, United States Court House, Seattle 4, Washington, appeared for and on behalf of the Plaintiff; and John F. Evich, 1903 Smith Tower, Seattle 4, Washington, appeared for and on behalf of the Defendant. [2] * * * * *

CONDIE M. MAY

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

(Testimony of Condie M. May.)

The Witness: Condie M. May, M-a-y (spelling).

The Clerk: C-o-n-d-i-e (spelling)?

The Witness: Yes.

Q. (By Mr. Guterson): Will you state your full name once again, sir? A. Condie M. May.

Q. And what is your address?

A. Stewart Hotel.

Q. And what is your occupation, sir?

A. I am the resident manager of the Stewart Hotel.

Q. How long have you been connected with the Stewart Hotel?

A. Oh, about thirty-seven years.

Q. Were you working at the Stewart Hotel during the month of June, 1952? [4] A. Yes.

Q. In your present capacity as manager?

A. Manager and auditor too, a combination.

The Clerk: Plaintiff's Exhibit number 3 marked for identification.

(Plaintiff's Exhibit 3 marked for identification.)

Q. (By Mr. Guterson): Mr. May, I am now handing you what has been marked as plaintiff's proposed Exhibit number 3. Will you kindly examine that sheet of paper and tell me whether or not you recognize it?

A. Yes, I do because of the——

Q. (Interposing) What is it, sir?

A. It is part of our records, our record of guests.

(Testimony of Condie M. May.)

Q. Is it a registration record for guests at your hotel?

A. It is a record of the parties registered, yes.

Q. And is that a record which is prepared at the Stewart Hotel in the regular course of your business? A. Yes.

Q. And has it been retained in the regular [5] course of your business with your regular business records? A. Yes.

Q. Are you the official custodian of that record?

A. Yes.

Q. To your knowledge, Mr. May, is that registration sheet in the same condition as it was when the entries thereon were made? A. Yes.

Mr. Guterson: We will offer proposed Exhibit 3.

Mr. Evich: No objection.

The Court: Exhibit number 3 may be admitted.

(Plaintiff's Exhibit 3 admitted in evidence.)

Mr. Guterson: Thank you.

(Whereupon, there was a brief pause.)

The Court: Any further questions?

Mr. Guterson: Just one, yes.

Q. (By Mr. Guterson): Directing your attention now to what has been admitted in evidence as [6] Exhibit number 3, Mr. May, do you note thereon the registration of anyone under the name of Frank and Mrs. LaMar? A. Yes, I do.

Q. And does it note the date that they were registered at the Stewart Hotel? A. Yes.

Q. What dates?

A. June 19th to 24th, 1952.

(Testimony of Condie M. May.)

Q. (By Mr. Guterson): Thank you, sir, I have no further questions.

Mr. Evich: No questions.

The Court: That is all, Mr. May.

Mr. Guterson: May Mr. May be permanently excused, your Honor?

Mr. Evich: No objection.

The Court: Very well, you may be excused from further attendance under the subpoena, Mr. May.

The Witness: Thank you.

Mr. Guterson: Thank you.

(Witness excused.)

Mr. Guterson: We will call Mr. Hass. [7]

WALTER HASS

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Walter Hass, H-a-s-s (spelling).

Q. (By Mr. Guterson): Will you state your full name, please? A. Walter Hass.

Q. And how do you spell your last name?

A. H-a-s-s (spelling).

Q. And what is your residence address, Mr. Hass? A. 22425 - 78th West, Edmonds.

Q. Edmonds? A. Yes, sir.

Q. What is your occupation?

A. I am a bellman.

(Testimony of Walter Hass.)

Q. Where are you presently a bellman?

A. At the Stewart Hotel.

Q. How long have you been a bellman at the Stewart Hotel? [8]

A. Going on seven years.

Q. Do you recall when it was or what year it was that you first commenced your duties there?

A. In 1951, I believe, sir.

Q. And do you work any particular shift at the Stewart Hotel?

A. Yes, I work the night shift, eleven to seven in the morning.

Q. Have you worked that same shift during the entire period you have been there?

A. Yes, sir.

Q. Do you recognize the defendant in this case, Florence Umbriaco, Mr. Hass? A. Yes, I do.

Q. Do you see her here in the courtroom?

A. Yes.

Q. And by what name do you know the defendant? A. Florence LaMar.

Q. Do you recall when it was that you first met the defendant? A. I think it was in 1952.

Q. Where was it that you first met her in 1952?

A. She was living in the hotel. [9]

Q. At the Stewart? A. Yes, sir.

Q. And do you recall whether she was living there alone or with someone?

A. She was with her husband.

Q. Do you know what her husband's name is?

A. Frank LaMar or Umbriaco.

(Testimony of Walter Hass.)

Q. Following the time that you first met her in 1952 did you ever thereafter have occasion to telephone her? A. Yes, one time.

Q. And do you know where it was that you called her at? A. At her residence.

Q. Was it a Seattle 'phone number or some other? A. A Seattle number.

Q. Did you have any conversation with her over the 'phone? A. Yes, sir.

Q. And will you tell the court and the jury as best you can remember what you said and what she said in that 'phone conversation?

A. I asked her if she could come down to the hotel. [10]

Q. What did she say?

A. She could, I believe, or words to that effect.

Q. Do you recall anything else that was said in the telephone conversation; any words that you used or that she used?

A. I think I said, "I have a deal for you."

Q. A what? A. A deal for her.

Q. What was the purpose of your calling her, Mr. Hass?

A. Well, I had a gentleman in the house that asked to see a girl.

Q. For what purpose?

A. Well, I imagine prostitution.

Q. Following your 'phone conversation with the defendant, did she come down to the Stewart Hotel?

A. Yes.

Q. Approximately how long after the 'phone

(Testimony of Walter Hass.)

conversation? A. Probably one-half an hour.

Q. Did you see her there? A. Yes.

Q. Where did you meet her? [11]

A. In the elevator.

Q. And do you operate the elevator during the night time hours? A. Yes, I do.

Q. Did you have any conversation with her in the elevator? A. I took her to the room.

Q. You what? A. I took her to the room.

Q. Did you have any conversation with her?

A. I just told her what type of a gentleman he was.

Q. Do you recall what you said and what she said, as best you can?

A. No, other than the fact that I told her that the fellow was a nice fellow, or something to that effect.

Q. Did you take her to any particular room in the hotel? A. Yes.

Q. Did you enter the room? A. No.

Q. Did she? A. Yes.

Q. Where did you go? [12]

A. Back in the elevator.

Q. Did you ever have occasion to see her again that night?

A. When she came out, yes, sir.

Q. Approximately how long later was that?

A. I couldn't remember, sir, now.

Q. Where did you see her when you next saw her that night? A. In the elevator.

Q. And at that time did you have any conver-

(Testimony of Walter Hass.)

sation with her? A. Yes.

Q. What was said; just the best you can remember, by her and by yourself?

A. Well, I couldn't possibly recall that long. I know she gave me some money and that was about it. I don't remember what she said or what I said.

Q. Did you ever thereafter see her again during 1952? A. I believe I had, yes.

Q. Where were those meetings at?

A. In the hotel.

Mr. Guterson: I have no further questions. [13]

Cross Examination

Q. (By Mr. Evich): Mr. Hass, you are not sure whether this was 1952 or 1953 when you first saw her? A. The first time I saw her?

Q. Yes.

A. Well, it was shortly after she first checked in the hotel, sir.

Q. Do you have any way of fixing the date?

A. No, I haven't other than—

Q. (Interposing) You are just guessing as to what the dates were?

A. Yes, I would have to say that.

Q. It could have been 1953 or 1954?

A. Well, it was whenever they checked in at the hotel and it is supposed to have been 1952 and that is probably it.

Q. Well, did she and her husband check into the hotel more than once?

A. Yes, quite often, sir.

(Testimony of Walter Hass.)

Q. So that you don't know whether it was the first time they checked in or the second time or the third time?

A. It was the first time I ever met them.

Q. It was the first time you ever met them?

A. Yes.

Q. And that could have been 1954 as well as [14] 1952, could it not?

A. Well, it could have been, yes.

Mr. Evich: It could have been. I have no further questions.

The Court: Anything further, Mr. Guterson?

Mr. Guterson: Yes.

Redirect Examination

Q. (By Mr. Guterson): As best your memory serves you, Mr. Hass, how many years ago would you fix the time of your first meeting with the defendant?

Mr. Evich: If your Honor please, I object to the question. He has already answered it.

The Court: Objection overruled.

Q. (By Mr. Guterson): (Continuing) Do you understand the question?

A. Yes, sir. It was a good five years ago anyway.

Mr. Guterson: I have no further questions.

Recross Examination

Q. (By Mr. Evich): You are not positive of that? [15]

A. Yes, sir, I am.

Q. You are positive?

A. Yes, it is a good five years.

(Testimony of Walter Hass.)

Q. You have no way of fixing the time that you called? You say you called her on two occasions?

A. No, just one, sir.

Q. Just one; do you know her husband too?

A. Yes.

Mr. Evich: I have no further questions.

Mr. Guterson: Nothing further.

The Court: That is all.

Mr. Guterson: May this witness be permanently excused?

Mr. Evich: No objection.

The Court: You may be excused from further attendance under the subpoena.

The Witness: Thank you.

Mr. Guterson: Mr. Martell. [16]

MARIUS MARTELL

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Marius Martell, M-a-r-i-u-s (spelling).

The Clerk: Your last name?

The Witness: M-a-r-t-e-l-l (spelling).

The Clerk: M-a-r-t-e-l-l (spelling)?

The Witness: Yes.

Q. (By Mr. Guterson): Will you state your full name once again, sir?

(Testimony of Marius Martell.)

A. Marius Martell.

Q. Keep your voice up so that all can hear you.

A. Marius Martell.

Q. And what is your residence address, Mr. Martell? A. 1945 Fairview North.

Q. That is here in Seattle?

A. Yes, sir. [17]

Q. What is your occupation?

A. I am a bellman.

Q. Where are you a bellman?

A. At the Stewart Hotel.

Q. How long have you been a bellman?

A. At the Stewart Hotel?

Q. Yes. A. Seven years.

Q. Were you working at the Stewart Hotel during the period from June, 1952 until February, 1953? A. Yes, sir.

Q. Do you recognize the defendant in this case, Florence Umbriaco? A. Yes, sir.

Q. Excuse me? A. Yes.

Q. When was it that you first met the defendant? A. 1952.

Q. And by what name did you know her?

A. Just Flo.

Q. What? A. Flo.

Q. Where was it that you first met her? [18]

A. At the hotel.

Q. The Stewart? A. Yes, sir.

Q. And do you recall where in the Stewart Hotel it was that you first met the defendant?

A. In the side lobby.

(Testimony of Marius Martell.)

Mr. Evich: I didn't hear the answer.

The Witness: The side lobby.

Q. (By Mr. Guterson): The side lobby, is that your answer? A. Yes it is, sir.

Q. Did you have any conversation with her on that occasion? A. Not that I know of, no.

Q. Do you recall any words she said to you or that you said to her; not the exact words or anything but just as you recall it, the gist of what was said?

A. I can't possibly remember what was said but she said she was working.

Q. She said she was what?

A. She was working and gave me her number.

Q. What kind of work was she referring to?

Mr. Evich: Now, just a minute, your Honor. I object to that question as calling for a conclusion.

The Court: Objection sustained. [19]

Q. (By Mr. Guterson): (Continuing) Did she say anything further at all? A. No, sir.

Q. You say she gave you her number; you mean a telephone number? A. Yes, sir.

Q. Was there anything at all said concerning the telephone number? A. No, sir.

Q. Did you take the number from her?

A. Yes, sir.

Q. Following that meeting with her did you ever have occasion to telephone her?

A. Oh, about one month later.

Q. And did you call her at the number you had?

A. Yes, sir.

(Testimony of Marius Martell.)

Q. Did you have any conversation with her over the telephone on that occasion? A. No, sir.

Q. What was said; the gist of what you said when you called her, as best you can remember?

A. I told her to come down to the hotel. [20]

Q. What did she say?

A. She would be right down.

Q. Did she come down on that occasion?

A. Yes, sir.

Q. For what purpose had you called her, Mr. Martell?

Mr. Evich: Just a minute, your Honor. I object to that as calling for a conclusion. I think he can ask what was said and what was done.

The Court: Well, I think the form is probably objectionable. I will sustain it.

Q. (By Mr. Guterson): (Continuing) What circumstances or things had occurred prior to your calling her? A. What was that again?

Q. What circumstances or things had occurred or transpired or had taken place before you called the defendant?

Mr. Evich: I will object to this, your Honor, as being too all-inclusive. It covers too much territory as to what occurred or what transpired; nothing as shown in the presence of the defendant and, therefore, I object.

The Court: I think he can testify as to why he called her if that is what you are asking. [21]

Mr. Guterson: That is what I am asking.

(Testimony of Marius Martell.)

Q. (By Mr. Guterson): (Continuing) Do you understand the question, Mr. Martell?

A. Why I called her?

Q. Why did you call the defendant?

A. Well, there was a man wanted somebody and I called her.

Mr. Evich: I can't hear a word you are saying.

The Court: Keep your voice up.

A. (Continuing) Somebody wanted a girl so I called her.

Q. (By Mr. Guterson): Somebody wanted a girl for what? A. Prostitution.

Q. Following your telephone call to the defendant did you see her that day or that night?

A. No.

Q. Did she come down to the hotel or didn't she? A. Yes, sir.

Q. Approximately how long after the telephone call? A. Well, one-half an hour. [22]

Q. Did you meet her at the hotel? A. Yes.

Q. Did you have any conversation with her when you met her?

A. I just told her to go upstairs to the room.

Q. Did you go anywhere with her, or did she go by herself? A. She went by herself.

Q. Did you tell her anything as to what room to go to? A. Yes.

Q. Did you give her a room number?

A. Yes, sir.

Q. After she left your sight then and went upstairs, did you see her again?

(Testimony of Marius Martell.)

A. Yes, when she came down.

Q. About how much later was that?

A. One-half an hour.

Q. Did you have any conversation with her then? A. No.

Q. Did you receive anything from her then?

A. I think I did, yes.

Q. What?

A. Money, but I don't remember how much.

Q. Did you have any conversation with her at the time you received the money from her?

A. No.

Q. Was anything at all said by you to her or by her—by you to her or by her to you at that time, just anything?

A. Not that I can recall, sir.

Q. Following this occasion did you ever again call her? A. Yes.

Q. Approximately how much after the first call was the second call? A. About two weeks.

Q. Did you call her at the same number you had called the first time? A. Yes.

Q. And what did you say and what did she say over the telephone on that occasion?

A. She said she would come down.

Q. What did you say to her?

A. I just asked her to come down to the hotel.

Q. And what did she say?

A. She would be down.

Q. Why did you call her on the second [24] occasion? A. For the same reason.

(Testimony of Marius Martell.)

Q. Would you state it for the court and the jury, please? A. For prostitution.

Q. And where was the prostitution to occur?

A. Up in one of the rooms of the hotel.

Q. In the Stewart Hotel? A. Yes, sir.

Q. Following the second call did the defendant come down to the Stewart Hotel? A. Yes.

Q. And about how long after the call?

A. Oh, I don't know exactly.

Q. Did you see her when she came down?

A. Yes, sir.

Q. And what conversation did you have with her or what did you say to her or what did she say to you?

A. Well, I just told her where to go.

Q. Did you give her a particular room number?

A. Yes, sir.

Q. Was that a room number of a room at the Stewart Hotel? [25] A. Yes, sir.

Q. After she left your sight then on this occasion did you see her again?

A. Yes, she came right down and said there was nobody there.

Q. Did you have any conversation with her then when she came down?

A. After she told me that she left.

Q. Did you see her again? A. No, sir.

Q. Did you during this same period of time call her on any other occasion?

A. Not that I can recall.

Mr. Guterson: I have no further questions.

(Testimony of Marius Martell.)

Cross Examination

Q. (By Mr. Evich): You didn't see her perform any acts of prostitution, did you, Mr. Martell?

A. No, sir.

Q. You don't know what happened in the room that she went into? A. No, sir.

Q. You are not positive as to the time that this happened either, are you?

A. No, sir. [26]

Q. Did you have occasion to call other girls?

A. Yes, sir.

Q. Could you be mixed up with other calls that you made to other girls? A. Pardon me?

Q. Could you be confused as to the time you called other girls and you now thought it was Flo?

A. I don't know what time it was or anything; dates or anything.

Q. You don't know anything about the dates or the times, do you? A. No, sir.

Q. You know that for the past seven years you have called Flo on two occasions, is that it?

A. It must be.

Q. You don't know when the dates were?

A. No, sir.

Mr. Evich: I have no further questions.

Redirect Examination

Q. (By Mr. Guterson): Did you testify before, Mr. Martell, that you regarded the first time you met her was in 1952? A. Yes, sir.

Mr. Guterson: I have no further questions. [27]

Mr. Evich: No further questions.

The Court: Is that all?

Mr. Guterson: That is all. May this witness be permanently excused?

Mr. Evich: No objection.

The Court: All right, you may be excused from further attendance under the subpoena.

(Witness excused.)

Mr. Guterson: Mr. Denny. [28]

EDWARD J. DENNY

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Edward J. Denny.

The Clerk: D-e-n-n-y (spelling)?

The Witness: Right.

Q. (By Mr. Guterson): Will you state your full name once again, sir?

A. Edward J. Denny.

Q. And what is your home address?

A. 7012 25th Northeast.

Q. That is here in Seattle? A. Seattle.

Q. What is your occupation? A. Bellman.

Q. Where are you employed?

A. Hungerford Hotel.

Q. Approximately how long have you been employed as a bellman at the Hungerford Hotel?

(Testimony of Edward J. Denny.)

A. Approximately four years. [29]

Q. Do you recognize the defendant in this case, Florence Umbriaco? A. Yes, I do.

Q. And when was it that you first met the defendant? A. Oh, 1954.

Q. Do you recall approximately what month during 1954 that it was?

A. Well, it was around August.

Q. What name did you know her by?

A. Flo.

Q. Any last name at all? A. No.

Q. Where was it that you first met her?

A. Hungerford Hotel.

Q. And do you recall the circumstances or what conversation, if any, you had with her at the time of this first meeting?

A. Well, I think I called her the first time.

Q. You called her? A. Yes.

Q. And following that call did she come down to the hotel? A. Yes.

Q. And that is the first time you had seen her?

A. Yes. [30]

Q. And what conversation, if any, did you have with her when you first saw her when she did come down to the hotel?

A. Well, I saw her in the elevator.

Q. Did you have any conversation with her?

A. Very short.

Q. Do you recall what it was, however short it may have been?

A. Well, she—as close as I can remember she

(Testimony of Edward J. Denny.)

said—she thanked me for the call and went on out.

Q. Why had you called her?

A. Well, I had a call.

Q. A call for what? A. For a girl.

Q. A girl for what? A. Prostitution.

Q. At the Hungerford Hotel? A. Yes, sir.

Q. Did you take the defendant to any particular room in the hotel? A. No, sir.

Q. Did you take her into the elevator?

A. No, sir. [31]

Q. Did you tell her where to go, what room to go to? A. Yes, sir.

Q. And following that did you see her again that day or that evening?

A. No; I saw her when she went out of the elevator, when she was leaving.

Q. When she was leaving. About how much later was that after you directed her to the room?

A. I don't know, probably one-half hour.

Q. And did you have any conversation with her then? A. Very short.

Q. Did you receive anything from her then?

A. Yes.

Q. What was it? A. Money.

Q. At the time you received the money did you have any conversation with her at all? Did she say anything at all or did you say anything at all to her?

A. Well, I think she thanked me for the call and said I could call her any time.

Q. Did you ever again thereafter call her?

(Testimony of Edward J. Denny.)

A. Yes. [32]

Q. Approximately how many times thereafter did you call her?

A. Oh, five or six; in that neighborhood.

Q. What period of time would you say was covered during this period that you say you called her five or six times?

A. Oh, probably over a period of four months.

Q. Beginning in August, 1954?

A. And thereafter.

Q. Immediately thereafter? A. Yes.

Q. And on those occasions did you call her at the same number you had called her on at the first time? A. Yes.

Q. Why did you call her on each of those additional five or six occasions?

A. For the same thing I called her the first time.

Q. Will you state what it was for the record, Mr. Denny? A. Prostitution.

Q. Did it relate to prostitution at the Hungerford Hotel? A. Yes, sir. [33]

Q. On each of those occasions did she come down to the Hungerford Hotel? A. Yes, sir.

Q. And on each of those occasions did you direct her to a room in the hotel?

A. No, I gave her the room number.

Q. Did you give her the room number?

A. Yes.

Q. Was it a different room number each time?

A. Yes.

(Testimony of Edward J. Denny.)

Q. Different guests involved? A. Yes.

Q. What arrangement, if any, did you have with her for meeting her following going to the particular room number you had given her?

A. When she was ready to come down she would call and ask for me and I would go to the room.

Q. And bring her down?

A. And knock on the door and we would meet in the elevator and come down and that was it.

Q. On each of these occasions did you receive anything from her?

A. I received money, yes.

Mr. Guterson: I have no further questions. [34]

Cross Examination

Q. (By Mr. Evich): Did you call other girls, Mr. Denny? A. No, sir.

Q. What? A. No, sir.

Q. This is the only girl you ever called? How long have you been bellhopping?

A. Since 1929-'31.

Q. Since what? A. '31.

Q. Since 1931, and it is your testimony that this is the only girl that you have ever called?

A. Ever called?

Q. Yes, sir. A. No, sir.

Q. You have called other girls?

A. Yes, sir.

Q. Did you call others during the period of time you testified you called Flo? A. No.

Q. Now, you don't know what went on in the

(Testimony of Edward J. Denny.)

room or what happened? A. No, sir.

Q. You had no prearranged agreement with [35] the defendant here, did you?

A. What do you mean, sir?

Q. Well, you didn't have any arrangement with her that you were to get so much money from her?

A. No.

Q. Do you recall the room numbers?

A. No, I do not.

Q. You don't recall any of that at all?

A. (Witness nodded in the negative.)

Q. You saw her perform no acts of prostitution?

A. I beg pardon?

Q. You saw her perform no acts of prostitution?

A. No, sir.

Q. You didn't see her take any money from any man? A. No, sir.

Q. You didn't see her perform an act of intercourse? A. No, sir.

Mr. Evich: I have no further questions.

Mr. Guterson: Nothing further.

The Court: That is all. [36]

Mr. Guterson: May Mr. Denny be permanently excused?

Mr. Evich: No objection.

The Court: Very well; Mr. Denny, you may be excused from further attendance under the subpoena.

(Witness excused.)

Mr. Guterson: Mr. Campbell. [37]

GAIL GORDON CAMPBELL

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Gail Gordon Campbell.

The Clerk: G-a-i-l (spelling)?

The Witness: Yes.

The Clerk: C-a-m-p-b-e-l-l (spelling)?

The Witness: Yes.

Q. (By Mr. Guterson): Just have a chair, please. Will you state your full name, please?

A. Gail Gordon Campbell.

Q. Gail Gordon Campbell?

A. That is right.

Q. What is your address?

A. 2417 West 197th.

Q. 2417 West 197th? A. Yes.

Q. What is your occupation? A. Janitor.

Q. And where are you a janitor? [38]

A. At the Washington Athletic Club.

Q. At the Washington Athletic Club?

A. Yes.

Q. What shift do you work as a janitor?

A. Nights.

Q. How long have you worked there as a janitor? A. Eleven years.

Q. Are you working there now? A. Yes.

Q. Do you recognize the defendant in this case?

(Testimony of Gail Gordon Campbell.)

A. Yes.

Q. And by what name do you know her?

A. Flo Andrews.

Q. Flo Andrew? A. Yes.

Q. When was it approximately that you first met the defendant, as you remember it, Mr. Campbell? A. Near the end of '53.

Q. Near the end of '53; where was it that you first met her?

A. At a drugstore in the Astor Hotel.

Q. Excuse me? [39]

A. In the drugstore at the Astor Hotel.

Q. At a drugstore, did you say, at the Astor Hotel? A. Yes.

Q. Is that in Seattle? A. Yes.

Q. Following that first meeting and on the occasion of the first meeting with her did you have sexual intercourse with her? A. Yes.

Q. Where did that take place?

A. At the hotel, the Astor Hotel.

Q. Were you living at the Astor Hotel?

Mr. Evich: If your Honor, please——

A. (Interposing) No.

Mr. Evich (continuing) ——I will object to this and ask for a mistrial as going beyond the bounds of the indictment charge in this case. They have got her charged with perjury on two counts and now they are taking in proof of other crimes, which is highly prejudicial to this defendant, and I ask for a mistrial.

(Testimony of Gail Gordon Campbell.)

The Court: Well, the action just testified to, of course, is not within the period.

Mr. Guterson: It is not directly within the period, your Honor, but I think it bears [40] properly upon it, and I also believe Exhibit number 2, which is in evidence, the transcript of the entire testimony of the defendant on the prior occasion covers certainly this period we are going into is before the jury already.

Mr. Evich: She admits certain acts with this man during the period.

Mr. Guterson: If we can stipulate to the period prior to the period here it is most agreeable.

Mr. Evich: It is strictly prejudicial.

The Court: Well, I think we will at this time strike this portion of the testimony and I suggest you go up to the period involved in the indictment.

Members of the jury, the court strikes the testimony of this witness with respect to the matters referred to which occurred during 1953—

Q. (By Mr. Guterson): You testified—

The Court: (Continuing) —and the jury will disregard it.

Mr. Guterson: Excuse me.

Q. (By Mr. Guterson): (Continuing) You testified, Mr. Campbell, [41] that you met the defendant in 1953. Over what period of time did you know her from; 1953 to when? For how many years did you know her? A. Four years.

Q. Right up to the present time?

A. Present time.

(Testimony of Gail Gordon Campbell.)

Q. All right, did you know her during the period between September, 1954 and December, 1955?

A. Yes.

Q. Now, during that approximate fifteen-month period did you ever have sexual intercourse with her for money? A. Yes.

Q. And during that period approximately how often would you say that you did have intercourse with her for money; every week, every month, every two months?

A. Every month, something like that.

Q. And approximately how much did you pay her on each of those occasions?

A. Fifty dollars.

Q. Fifty dollars; did those acts of sexual intercourse take place at just one place or at different places? [42] A. Different places.

Q. What places, for example?

A. Oh, different hotels.

Q. Different hotels, did you say? A. Yes.

Q. Here in Seattle? A. Yes.

Q. Now, on those occasions did you and she arrange to meet one another or did you meet her by having some bellman or some bellhop at a hotel call her?

A. We arranged them ourselves.

Mr. Guterson: I have no further questions.

Cross Examination

Q. (By Mr. Evich): Mr. Campbell, you loaned the defendant some money, did you not? You loaned her some money, did you not?

(Testimony of Gail Gordon Campbell.)

A. She owed me.

Q. She owed it to you? A. Yes.

Q. But you loaned it to her? A. Yes.

Q. You gave it to her willingly?

A. Yes. [43]

Q. You say you visited her, you made arrangements to visit her yourself, is that right?

A. Yes.

Q. You were never in the Stewart Hotel, were you? A. No.

Q. You say you have known her for about four to five years, is that right? A. That is right.

Q. Do you consider Flo your friend?

A. Yes.

Q. She is a good friend of yours?

A. Yes, sir.

Q. Is that right? A. That is right.

Mr. Evich: I have no further questions.

Mr. Guterson: Nothing further.

The Court: That is all, Mr. Campbell.

Mr. Guterson: May Mr. Campbell be permanently excused?

Mr. Evich: No objection.

The Court: You may be excused from further attendance.

(Witness excused.)

Mr. Guterson: Mr. Hutchings. [44]

THOMAS HUTCHINGS

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Thomas Hutchings, H-u-t-c-h-i-n-g-s (spelling).

Q. (By Mr. Guterson): Will you state your full name once again, please?

A. Thomas Hutchings.

Q. What is your home address?

A. 9415 21st SW.

Q. That is here in Seattle? A. Yes, sir.

Q. What is your occupation, Mr. Hutchings?

A. Bellboy.

Q. Where are you a bellboy?

A. Morrison Hotel.

Q. How long have you been a bellboy at the Morrison Hotel?

A. Three and one-half years.

Q. That is three and one-half years dating [45] back from today, approximately? A. Yes.

Q. Prior to the time you were a bellboy at the Morrison, just before that, where did you work?

A. At the Stewart Hotel.

Q. What kind of work did you do there?

A. The same thing, bellboy.

Q. Now, do you know the defendant in this case, Florence Umbriaco? A. Yes.

Q. What name do you know her by?

(Testimony of Thomas Hutchings.)

A. Well, Florence LaMar.

Q. And do you recall where it was that you first met her? A. At the Stewart Hotel.

Q. Where in the Stewart?

A. I think it was in the bar.

Q. Do you recall approximately when it was that you first met her?

A. That is the first time I met her.

Q. Do you know when that was? Approximately when it was? A. I think it was in 1953.

Q. Now, during the period between September, 1954 and December, 1955, were you working at the Morrison Hotel? [46] A. Yes.

Q. During that period did you ever see the defendant? A. Yes.

Q. Where was it that you saw her during that period; was it at the Morrison or at another place?

A. At the Morrison.

Q. During that period did you ever have occasion to telephone her? A. Yes.

Q. Did you telephone her in Seattle or some other community? A. In Seattle.

Q. And why did you call her on the occasions that you did call her during that period?

A. Oh, to perform an act of prostitution.

Q. Where at? A. At the Morrison Hotel.

Q. Approximately, as best you can recall it, Mr. Hutchings, what did you say over the 'phone and what did she say; just the gist of the conversation?

A. Well, I asked if she could come down and [47] she would say yes or no.

(Testimony of Thomas Hutchings.)

Q. If she said yes, did she come down?

A. Yes.

Q. Approximately how long following the telephone conversation?

A. Oh, one-half hour, to one hour, I think.

Q. Did you have any conversation with her at the Morrison Hotel when she came down?

A. Not usually.

Q. Did you say anything at all to her or did she say anything at all to you?

A. Well, I would usually just take her up to the room. I don't remember what we said.

Q. Did you run the elevator? A. Yes.

Q. Did you take her to a particular room in the hotel? A. Yes.

Q. And following taking her to the room did you see her on that occasion sometime thereafter?

A. Yes.

Q. Approximately how much later?

A. Well, I don't know exactly, maybe one-half an hour, something like that. [48]

Q. Did you receive anything from her on that occasion? A. Yes.

Q. What? A. Money.

Q. Did you have any conversation or any words at all between the two of you when you saw her again?

A. I don't think so. I can't remember any.

Q. Do you remember anything at all said by you to her or by her to you? A. No.

Q. Approximately how many times during that

(Testimony of Thomas Hutchings.)

period from September, 1954, until December, 1955, did you call her?

A. I think three or four times.

Q. And why did you call her on each of those three or four times?

A. For the same thing.

Q. What was that same thing?

A. Prostitution.

Q. At the Morrison? A. Yes.

Q. Did you receive any money from her on each of those occasions? A. Yes. [49]

Q. During that same fifteen-month period, Mr. Hutchings, did you ever receive any calls from her?

A. I don't think so.

Q. Did you ever meet her at the hotel when she came in by herself without you having called?

A. Oh, yes, she had been in there before.

Q. Did you ever have any conversations with her on those occasions?

A. I think one time she came in and got some whiskey is all.

Q. Did she say anything or did you have any conversation with her?

A. I don't know, I might have sat down and had a drink with her. I can't remember.

Mr. Guterson: I have no further questions.

Cross Examination

Q. (By Mr. Evich): When did you say you first met her? A. At the Stewart Hotel.

Q. What year was that?

(Testimony of Thomas Hutchings.)

A. I think in 1953.

Q. 1953; you say you called her at the Morrison Hotel?
A. Yes, sir. [50]

Q. What was the first time you made the call?

A. I was working at the Morrison Hotel but I don't know the date.

Q. You don't know the dates?
A. No, sir.

Q. You don't know whether it was the period September, 1954, until December, 1955; you don't know whether it was in that time or later?

A. I know it was during that time.

Q. The first call you made, was that the time you were arrested?

A. I don't know exactly, no.

Q. What?

A. I don't exactly know that.

Q. Was that the first time you called her?

A. No, I don't think so.

Q. You were arrested in the Morrison Hotel, weren't you?
A. Yes, sir.

Q. And she was arrested too there, wasn't she?

A. Yes.

Q. And that was the first time you met her?

A. No, I met her before then. [51]

Q. You met her before then but you never called her before the time you were arrested?

A. I said I didn't remember if I did or not.

Q. You don't know what part of 1953 you met her in either?
A. No.

Q. You never saw her perform any acts of prostitution?
A. No, sir.

(Testimony of Thomas Hutchings.)

Q. Did you ever see her take any money from anyone? A. No, sir.

Q. You were arrested in 1956, weren't you?

A. Well, I don't know. I have been arrested a couple of times.

Q. At the Morrison Hotel in 1956, is that right?

A. Yes, sir.

Mr. Evich: I have no further questions.

Redirect Examination

Q. (By Mr. Guterson): Had you ever called the defendant to your knowledge, Mr. Hutchings, since the time you were arrested with her?

A. Since the time? [52]

Q. Yes. A. No, sir, I haven't.

Q. And, therefore, the three or four times you mentioned were times before the arrest?

A. Yes.

Mr. Guterson: No further questions.

Recross Examination

Q. (By Mr. Evich): You don't know when they were; they could have been in the spring of 1954 or the fall of 1954?

A. Well, I don't know the dates but I know I was working at the Morrison Hotel.

Q. In other words, you would have to guess at it? A. Yes.

Mr. Evich: No further questions.

Mr. Guterson: I have nothing further.

The Court: That is all.

Mr. Guterson: May this witness be excused, your Honor?

Mr. Evich: No objection.

The Court: All right, this witness may be excused from further attendance under the subpoena.

(Witness excused.) [53]

* * * * *

ALFRED G. GUNN

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Alfred G. Gunn. G-u-n-n (spelling).

Q. (By Mr. Guterson): Will you state your name? A. Alfred G. Gunn.

Q. What is your occupation?

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been so engaged?

A. For approximately sixteen years.

Q. And to what office are you presently assigned, Mr. Gunn? A. The Seattle office.

Q. How long have you been assigned out of the Seattle office? A. Since 1952.

Q. Are you familiar with the defendant in this case, Florence Umbriaco? [56] A. Yes, I am.

Q. Do you recall when it was that you first spoke with the defendant?

(Testimony of Alfred G. Gunn.)

A. I first spoke with her on the 'phone at about
—in about May of 1956.

Q. And by what name did you know her at that time?

A. Well, I knew of her as Florence Umbriaco, Florence LaMar, Eileen Farber. At that time those were the names I knew.

Q. Did you have occasion to talk to her some time thereafter over the telephone?

A. Yes, I did.

Q. When was that?

A. That was during the night of November 3rd, 1956.

Q. And where were you when you talked to her that night on the 'phone?

A. I was at my home.

Q. Pursuant to a message had you called her?

A. Yes, I had.

Q. Did you speak with her over the 'phone that night? A. Yes, I did.

Q. And can you relate for the court and the [57] jury what you said and what she said on that night?

A. The gist of it was that I arranged for her to meet me shortly after that call in my office, the FBI office, in Seattle.

Q. Did you meet her that night in the FBI office? A. Yes, I did.

Q. And who was present at the time of that meeting?

A. There was the night man that was on duty at

(Testimony of Alfred G. Gunn.)

the FBI. He was in the room, just through the glass from where I interviewed Florence, but just she and I were in the interview together.

Q. In your discussions with her on the night of November 3, 1956, Mr. Gunn, I will ask you specifically whether or not you and she discussed anything concerning the period from June, 1952 until February, 1956? A. Yes, we did.

Q. And to the best of your recollection, Mr. Gunn, will you tell us what you said and what she said concerning her work and so forth over that period of time?

A. Yes, This was during the discussion I had with her when we came to the period of June, 1952. [58] She advised me she had come to Seattle in June, 1952, with Frank Umbriaco, to whom she was married; that immediately upon arriving in Seattle—they had also come up with Frank's brother in his car—and immediately upon arriving in Seattle they had checked in at the Stewart Hotel. She advised me immediately after that Frank Umbriaco made arrangements with various bellhops, including Walsh, and Ernie, and Francie, and Oren and Chick for her to work as a prostitute while living at the Stewart Hotel. She told me she did work there while she and Frank lived there until they found an apartment at the Cambridge Hotel.

Q. Did she advise you how long they resided at the Cambridge Apartments? A. Yes, she did.

Q. What period did that cover?

(Testimony of Alfred G. Gunn.)

A. From the latter part of June, 1952 until February, 1953.

Q. During that approximate eight-month period, Mr. Gunn, did the defendant tell you anything about what she was doing here in Seattle?

A. Yes, she did.

Q. What did she say?

A. She told me she worked as a prostitute, [59] as a call prostitute, at the Stewart Hotel, and several other hotels in Seattle.

Q. Did she mention the names of any other hotels?

A. Yes, she did. She mentioned during this period other hotels, including the Atwood and the St. Regis and the Hungerford, and the Stratford Hotels.

Q. During the course of this discussion and interview with the defendant on the night of the third of November, did you have any conversations with her touching upon the period between September, 1954, and December, 1955?

A. Yes, I did.

Q. What did the defendant say to you and what did you say to her concerning that approximate fifteen-month period?

A. She told me that in about September, 1954, she and Frank Umbriaco had returned to Seattle from a trip they had made to Eureka, California, and that immediately upon resuming their residence here in Seattle at that time, she told me, they went again to the Stewart Hotel and checked in for a

(Testimony of Alfred G. Gunn.)

few days until they found another place to live; that she immediately started practicing prostitution [60] again under the call basis in Seattle and she told me the various places she lived after coming back to Seattle in the fall of 1954.

Q. Where did she say they lived after working out of the Stewart Hotel on that occasion?

A. She told me they lived on Capital Hill at an address on Eleventh Street; and she told me they lived in an apartment at 705 East Thomas; and from there they moved to a home out on Dexter Avenue.

Q. What did she say was her work or occupation during those months after she and Frank moved out of the Stewart Hotel?

A. She told me she worked the entire time as a prostitute, a call prostitute, at various hotels, the Hungerford, the St. Regis, the Morrison, the Stewart and the Stratford, I recall.

Q. Following this conversation with the defendant on November 3, did you ever again have an opportunity to speak with her concerning any of these matters? A. Yes, I did.

Q. When was that, sir?

A. That was on the morning of December 11, 1956. [61]

Q. Where did that conversation take place?

A. In this building, upstairs in the United States Attorney's office space.

Q. And who was present in the immediate room where you and she were?

(Testimony of Alfred G. Gunn.)

A. Well, at the beginning of the interview and during parts, most of it, another special agent, Edward Breen, and myself and Florence were present. Mr. Breen was in and out of the room during the interview.

Q. Were you the only agent there then all the time? A. Yes, I was.

Q. What on that occasion, Mr. Gunn, did you and the defendant discuss concerning the period from June, 1952 until February, 1953?

A. The same information as we had discussed on the previous interview, the places that she had lived, the places that she had worked as a call prostitute, including the Stewart Hotel and other hotels in Seattle.

Q. Did you on this same occasion in December, Mr. Gunn, 1956, have occasion to speak with the defendant concerning the period September, 1954, until December, 1955? [62]'

A. Yes, I did.

Q. What statement, if any, did she make concerning her work or occupation during that period of time?

A. She made the same statements as to her coming back from this trip to Eureka, California, and the places that she lived and the places she practiced as a call prostitute, the various hotels in Seattle.

Mr. Guterson: I have no further questions.

(Testimony of Alfred G. Gunn.)

Cross Examination

Q. (By Mr. Evich): Mr. Gunn, you say that you talked to her alone on these occasions?

A. I talked to her alone. The first occasion in the FBI office I interviewed her myself then.

Q. That was in November, 1956?

A. November 3, 1956.

Q. Did you talk to her alone December 11, 1956?

A. Part of the time we were alone. Mr. Breen was in and out. He was busy on another matter part of the time.

Q. December 11, 1956, was she under arrest?

A. No, she was not. [63]

Q. Was there a marshal served—was she served a subpoena by the United States Marshal at that time?

A. She was awaiting testimony before the Grand Jury. She was waiting.

Q. She was brought in by the Marshal?

A. She accompanied the Marshal and myself.

Q. By an order she came in?

A. It was under a subpoena to the Grand Jury and I interviewed her while she was waiting to be called before the Grand Jury.

Q. She didn't come in of her own volition then as you implied at first?

A. On December 11, 1956, she came in on a subpoena.

Q. Yes; now, what was her condition on December 3, 1956 when you talked to her?

(Testimony of Alfred G. Gunn.)

A. November 3 or December? I didn't talk to her December 3.

Q. November 3, 1956?

A. Yes, she had been drinking. I could tell that when I talked to her on the 'phone and when I arrived at my office and she told me she had been drinking. However, she was not drunk by any means and after I interviewed her for an hour or so she told me she was getting somewhat nauseated [64] and wanted to get out in the fresh air and that is the reason we discontinued the interview at that time.

Q. She was under the influence of liquor?

A. She had been drinking. She was not drunk in my opinion.

Q. But she was nauseated?

A. She told me she felt like she might be nauseated.

Q. Now, on December 11, 1956, was she under the influence then?

A. No. She apparently had been drinking during the previous night. I might explain that if you care for me to.

Q. I say, was she under the influence when you talked to her December 11, 1956?

A. She was not under the influence of liquor, no, she had been drinking.

Q. Was she under the influence of anything else besides alcohol?

A. Well, she had been physically beaten up several days previous to that and the morning that I

(Testimony of Alfred G. Gunn.)

contacted her on December 11 she had a doctor examine her and I was in the same house when the doctor was there and before she left with the Marshal and myself to come to this building the [65] doctor advised that her condition was such that she could come and satisfactorily appear.

Q. Did the doctor tell you at that time that she was under the influence of some drug that he had given her? A. No, he did not.

Q. Did he tell you that he had administered any drug at that time?

A. He told me that he had examined her and he may have mentioned that he gave her a pill or shot of some kind but I don't think so. I specifically asked the doctor if her condition was such that she could come down and appear before the Grand Jury and he advised definitely she could.

Q. She had been beaten up by her husband?

A. That is my understanding. She told me that that morning. I think that was Tuesday morning and he had beaten her the previous Thursday.

Q. There wasn't any question but she had been beaten up? A. Not in my mind, no.

Q. It was obvious she had been injured?

A. Well, she had marks on her neck and the side of her face from some type of injury. [66]

Q. It was apparent she was injured?

A. Well, something caused the marks and she told me what it was. Her husband beat her up and she told me why he beat her, too.

Q. Do you remember the doctor's name?

(Testimony of Alfred G. Gunn.)

A. I have his name written down. As I recall offhand it was a Dr. Morris—spelled a little differently than just Morris—in Ballard.

Q. You don't recall his name but you say it is Morris and you are not sure what it is.

A. I have it written down. I asked him his name at the time and I made a note of it and I put that in my file. He is from Ballard. It seems to me it is pronounced Morris but it is not spelled Morris.

Q. Was the doctor in her home or was she in the doctor's home?

A. The doctor came to her home.

Q. Was he there when you arrived?

A. No, he was not.

Q. He arrived after you got there?

A. Yes, that is right.

Q. Who was the officer with you at the time? What other agent was with you?

A. Are you referring to the time at her home?

Q. Yes, the time you brought her down here, December 11.

A. That was a Deputy United States Marshal. I think his name is Bernard Freeman.

Q. Was that Mr. Freeman that was with you?

A. Yes, I am pretty sure that is his name. He is still a Deputy United States Marshal down on the third floor.

Mr. Evich: I have no further questions.

Mr. Guterson: Nothing further.

The Court: That is all, Mr. Gunn.

The Witness: Thank you.

(Witness excused.)

Mr. Guterson: Mr. Coyne. [68]

VERNON P. COYNE

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Vernon P. Coyne. C-o-y-n-e (spelling).

Q. (By Mr. Guterson): Will you please state your full name once again, sir?

A. It is Vernon P. Coyne.

Q. What is your occupation, Mr. Coyne?

A. Special Agent, Federal Bureau of Investigation.

Q. How long have you been so engaged?

A. Approximately ten years.

Q. To what office are you presently attached?

A. The Seattle office.

Q. And how long have you been here in Seattle?

A. Since April, 1956.

Q. In the course of your duties as a Special Agent of the FBI, Mr. Coyne, have you met the defendant, Florence Umbriaco? [69]

A. I have.

(Testimony of Vernon P. Coyne.)

Q. And when was the first time that you met her, sir?

A. In June, June 12 of this year.

Q. And where did this meeting take place?

A. In George's on Sixth and Seneca.

Q. George's Cafe? A. George's Cafe.

Q. Who was present at that meeting?

A. Special agent Edward Breen, myself and the defendant.

Mr. Evich: I didn't get the name of the other agent.

The Witness: Edward Breen.

Q. (By Mr. Guterson): Did you have some conversation with the defendant at that time?

A. We did.

Q. Prior to the beginning of those conversations did either you or agent Breen in your presence advise the defendant that she had no compulsion or was under no compelling reason to speak with you?

A. Agent Breen made those statements to her. He told her, "You know, you have an attorney. You don't have to talk to us." [70]

Q. Could you describe her condition on that occasion so far as sobriety is concerned, Mr. Coyne?

A. She appeared to me to be sober.

Q. During the course of your meeting and conversation with her on June 12, 1957 did the defendant say anything to you and Agent Breen concerning the testimony which she had given in federal court on April 3, 1957?

A. Yes, she did. She stated to us that she had

(Testimony of Vernon P. Coyne.)

voluntarily called Breen—not Breen, excuse me—Gunn, Special Agent Gunn, on three occasions and she had given him a written statement and that statement was the absolute truth.

Further, that Frank Umbriaco's lawyer had told her lawyer to be sure to tell the truth during that trial; that she had come into court and she let not only Gunn down but the FBI and also Mr. Guterson.

Q. During the course of your conversation with the defendant on that occasion of June 12, 1957, did she say anything to you and Special Agent Breen concerning what her occupation had been both over the period from June of 1952 until February, 1953, and also the period from September, 1954 until December, 1955? [71]

A. She stated that she had been a call girl during that period. She stated that she worked out of the various hotels and that she had made thousands of dollars at that occupation and she always wanted to go first-class and that is how she made her money and she stated at least half of the money she earned in that manner went to Frank, and she stated at the time she was talking to us that he has now got it all.

Q. During the course of your interview and conversation with the defendant on June 12, 1957, did she say anything to you and Special Agent Breen concerning her knowledge of and activities with one Gail Gordon Campbell during the period from September, 1954 until December, 1955?

(Testimony of Vernon P. Coyne.)

A. Yes, she did. She stated to us that that person was a regular trick of hers. She charged him fifty dollars on each occasion and she went on further to describe him and she said he was horrible. She said, "You have no idea what it is to have to go to bed with a man like that. He is an imbecile and an idiot and he can't talk and I earned every penny I got from him."

She stated further she had received \$2,000 from him in a lump sum and she was going to invest [72] that in a restaurant and bar but the plans fell through.

Q. During the course of this conversation with the defendant on June 12, 1957, Mr. Coyne, did the defendant say anything to you and Special Agent Breen concerning having discussed what testimony she was going to give April 3, 1957, in the federal court before she did in fact testify April 3, 1957?

A. Yes, she did. She stated that she had the bellboys who she thought were going to testify come into her room and they had discussed the testimony that they were going to give and she stated that in general—she named one of the bellboys by the name of Kenny from the Stewart and he was only going to say that, "He called me twice and that is a laugh because I make my living that way and if he or any bellboy say they called me twice they are committing perjury because I made my living that way and how could I live unless they called me?"

Mr. Guterson: I have no further questions.

(Testimony of Vernon P. Coyne.)

Cross Examination

Q. (By Mr. Evich): Mr. Coyne, you say this took place in George's Cafe? [73]

A. Yes, it did.

Q. Was that a cocktail lounge?

A. Yes, it is.

Q. Were you in the cocktail lounge?

A. We were.

Q. Was she drinking?

A. She had a drink in front of her when we came in.

Q. Did you have a drink with her?

A. No.

Q. How long were you with her?

A. From one thirty-five to two twenty; that is p.m., approximately thirty minutes.

Q. Thirty minutes?

A. Fifty-five minutes.

Q. Fifty-five minutes; you say you had nothing to drink during that time?

A. That is right.

Q. Did she have anything to drink?

A. She did.

Q. Quite a bit?

A. She had a drink in front of her when we came in and she said, "This is my first", and she ordered another while we were there and that was there when we left. [74]

Q. She was drinking right along?

A. Yes, she was.

(Testimony of Vernon P. Coyne.)

Q. Did you say you were there and Mr. Breen?

A. Yes, that is right.

Q. Did you make any record of her conversation?

A. We did not.

Q. Did you say she called you there?

A. No, she called Special Agent Breen at our office.

Q. And you went along?

A. And I went along.

Q. You have recording devices, do you not, that record conversations sitting in a barroom?

A. There are such things in existence.

Q. You have that available, do you not?

A. I can get them but we did not on that occasion.

Q. You have a lot of recording—a lot of equipment for recording of testimony or conversations with people, have you not?

A. We do have such equipment.

Q. You are instructed in the use of recording apparatus too, are you not?

A. We know how to use them, yes. [75]

Mr. Evich: Yes. I have no further questions.

Mr. Guterson: Nothing further, your Honor.

The Court: That is all, Mr. Coyne.

(Witness excused.)

Mr. Guterson: Mr. Breen. [76]

EDWARD LEO BREEN, JR.

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Edward Leo Breen, Jr., B-r-e-e-n (spelling).

Q. (By Mr. Guterson): Will you state your full name again, please?

A. Edward Leo Breen, Jr.

Q. What is your occupation?

A. Special Agent Federal Bureau of Investigation.

Q. How long have you been engaged in that?

A. Since February, 1951.

Q. To what office are you presently assigned?

A. Seattle.

Q. How long have you been here in Seattle?

A. Since 1952.

Q. Are you familiar in the course of your duties as an agent of the FBI with the defendant, Florence Umbriaco? A. I am. [77]

Q. Did you have occasion to participate in her arrest on April 12, 1957? A. I did.

Q. Where did that take place?

A. At her room, 805 of the Cambridge Hotel on Fourth Avenue here in Seattle.

Q. At that time did you direct any questions to her concerning what her occupation was?

(Testimony of Edward Leo Breen, Jr.)

A. I did.

Q. What response did she make?

A. Housewife.

Q. Did you receive any telephone call or get any word from the defendant during the month of June, 1957? A. I did.

Q. Where were you when you received that call?

A. At my office.

Q. In Seattle? A. In Seattle, yes.

Q. What was the date of the call?

A. June 12.

Q. What was the gist or substance of the conversation between yourself and the defendant?

A. The defendant identified herself and I [78] recognized her voice and she said, "Mr. Breen, this is Florence. I would like to talk to you. I have a matter I want to talk over with you."

Q. What did you say?

A. I asked if she would care to come to my office and talk to me and she said, no, she would like to meet me at a place convenient to myself and herself and she suggested the Sparton Room at George's place.

Q. At what time was this?

A. Eleven twenty in the morning, approximately.

Q. Did you meet her that afternoon?

A. I did.

Q. What time?

A. Approximately one thirty p.m.

(Testimony of Edward Leo Breen, Jr.)

Q. Who was present at your meeting in George's Sparton Room?

A. The defendant, Agent Coyne and myself.

Q. Did you, before beginning your conversation and interview with the defendant, make any statement to her concerning the non-necessity of her talking with you?

A. That is right.

Q. What did you say? [79]

A. I told her she didn't have to make any statements to me; if she wished to make any statements I would have to listen to them. I told her she had an attorney, which was known to herself and myself, and she didn't have to make the statements if her attorney didn't want her to, and she said she wanted to talk to me.

Q. How would you describe her condition on that occasion so far as sobriety is concerned?

A. She appeared sober.

Q. In the course of the conversation with the defendant did she say anything to you concerning the testimony which she had given in federal court on April 3, 1957?

A. She did.

Q. What did she say?

A. She told me that she — initially when she talked to Gunn that — Mrs. Umbriaco said she called Gunn on three occasions to line him up.

Q. I didn't understand.

A. Mrs. Umbriaco told me she called Special Agent Gunn on three occasions to line him up; he wasn't going after her. She wanted to talk to him. After talking to Gunn she gave him a signed state-

(Testimony of Edward Leo Breen, Jr.)

ment which was true. Then she pointed out [80] her attorney had been called by her husband, Frank's attorney, and Frank's attorney told her attorney to have Florence tell the truth when she appeared in court, and she said, "When I appeared in court I didn't and I let Frank down and let Gunn down and let down all you fellows."

She told me prior to the trial she talked the matter over with her husband and brother and Frank called her a lady stool pigeon that was sending him to the joint.

Q. Did she make a statement to you and Special Agent Coyne on this occasion concerning what her occupation had been during the period between June, 1952 and February, 1953, and also during the period between September, 1954 and December, 1955? A. She did.

Q. What did she say concerning her occupation? During those two periods?

A. She said she was a call girl prostitute.

Q. Did she make any statement concerning where she operated? A. Yes.

Q. What did she say?

A. She said she operated off the streets of Seattle. [81]

Q. Did she mention hotels or anything of the sort?

A. She mentioned various hotels, including the Stewart Hotel.

Q. During the course of this interview with the defendant did she make any statement to you and

(Testimony of Edward Leo Breen, Jr.)

Special Agent Coyne concerning her activities with one Gail Gordon Campbell during the period from September, 1954 to December, 1955?

A. Yes, she did.

Q. What did she say about that?

A. She told me that Mr. Campbell was a fifty dollar trick of hers on a steady basis and she told me I had no idea what it was like to go to bed with this fellow, and he was an imbecile and horrible, and he couldn't talk and she said she earned every penny she got from him. She said during one of the associations she got a two thousand dollar sum of money which came into his hands after the death of his father and that this Campbell gave her the money to open up a restaurant and bar in Seattle but that the deal fell through and she never did open up.

Q. Did she say anything to you and Special Agent Coyne in the course of this conversation, June 12, 1957, about having discussed the testimony [82] she was going to give April 3, 1957, before she did testify April 3, 1957?

A. She did, sir.

Q. What statements did she make to you and Special Agent Coyne concerning that matter?

A. She told me prior to the trial April 3 she met with the bellhops that were supposed to appear as witnesses and they talked over her testimony and she stated in regard to one bellhop whom she identified as a bellhop at the Stewart and she said, "Kenny said he was going to tell them he called twice", and she said, "That was a laugh." She

(Testimony of Edward Leo Breen, Jr.)

said, "I make my money as a call girl prostitute and if I were only called twice to some place I would starve."

Mr. Guterson: I have no further questions.

Cross Examination

Q. (By Mr. Evich): This was all at George's Cafe?

A. Yes, sir, in the Sparton Room.

Q. That is in the cocktail lounge there?

A. Pardon?

Q. That is in the cocktail lounge there?

A. Yes, sir.

Q. She was drinking at the time? [83]

A. She had a drink before her when we arrived.

Q. Did she tell you she was afraid of her husband, Frank Umbriaco?

A. She told me she was separated from her husband at that time.

Q. He had beaten her up on various occasions?

A. She said he had given her a severe beating.

Q. At the time he was going to again?

A. No, Mrs. Umbriaco told me she and Frank were through and she was separated.

Q. But you say he accused her of being a stoolie?

A. This was before trial, April 3.

Q. This is after Mr. Umbriaco's trial now?

A. Yes, sir.

Q. This meeting at George's Cafe was after his trial?

(Testimony of Edward Leo Breen, Jr.)

A. Yes, sir, this meeting occurred June 12.

Q. You spoke of the attorney she had. You do not mean me? A. Pardon, sir?

Q. You spoke of the attorney she had. You do not mean me?

A. No, sir. I don't know the name of her [84] attorney at that time but she stated that Frank's attorney had told her attorney to have her tell the truth.

Q. You know Frank's attorney?

A. If my memory serves me it is Mr. Quigley, I am not sure.

Q. It wasn't me? A. No.

Q. That she referred to at that time?

A. No, sir, I don't believe it was yourself.

Q. Now, all this was in an oral conversation at the bar?

A. We were seated at a table. The bar was behind us and to the left, sir.

Q. Have you seen Florence under the influence of liquor?

A. I have—I have seen her with a drink in her hand on that date.

Q. At any time?

A. No, I have never seen Mrs. Umbriaco drunk or under the influence of liquor.

Q. Did you ever see her in a beaten condition?

A. I have seen her in the office of the United States Attorney when she told me that she had been beaten up the previous week. [85]

(Testimony of Edward Leo Breen, Jr.)

Q. And her appearance was that she had been beaten up?

A. She was able to manipulate.

Q. You have seen her when she was in a beaten condition, isn't that right?

A. Well, to be honest with you, sir, I don't know whether her condition could be described as a beaten condition.

Q. Did you ever see her with a black eye?

A. No, sir, I have never seen her with a black eye.

Q. Have you ever seen her with a puffed up jaw?

A. No, I have seen her with cuts on the side of her face.

Q. Did you ever see her with fingernail scratches along her neck?

A. On that one occasion there were some bruises in that area as I recall.

Q. Mr. Breen, you are a trained investigator and have been with the FBI for some time?

A. Yes, sir.

Q. There is no question in your mind when you say you saw her down there she had been beaten by someone?

A. There is no question in my mind because she told me. [86]

Q. And it was apparent?

A. Yes, there were marks on her face.

Q. And her neck of a beating, is that right?

A. Yes, I saw her face and neck. Usually fol-

(Testimony of Edward Leo Breen, Jr.)

lowing a beating there is considerable swelling but that had been lessened to a degree and her appearance wasn't too readily changed from her general appearance now.

Q. This conversation that you had with her at George's Cafe was prior to the time that she was indicted on the charges here, is that right?

A. Yes, sir. She was out on a bond at that time.

Q. She had been arrested?

A. That is right; she had been arrested April 12.

Q. She had been arrested April 12?

A. Yes, sir.

Q. She was out on bail at the time you talked to her? A. Yes, sir.

Q. You made no record outside of your memory as to that conversation?

A. Following the interview with Mrs. Umbriaco, Mr. Coyne and myself went to our office and wrote [87] down the notes of what took place and put those in the report, sir.

Q. In other words, you just made notes from your own recollection of what this conversation was?

A. That is right, sir, immediately following.

Q. You made no statement of what was said and asked her to sign it? A. No, sir, we didn't.

Mr. Evich: I have no further questions.

Redirect Examination

Q. (By Mr. Guterson): Mr. Breen, when you spoke of having seen the defendant on one occasion

(Testimony of Edward Leo Breen, Jr.)

with certain marks or markings on her face, are you referring to December, 1956?

A. Yes, when she was here to appear before the Grand Jury.

Q. At the interview of June 12, 1957, were there any marks or evidence of beating at that time?

A. No, sir.

Mr. Guterson: No further questions.

Recross Examination

Q. (By Mr. Evich): Did you go out with Officer Gunn to her house when the doctor was present?

A. No, sir. [88]

Q. Do you know what the doctor's name was on that occasion?

A. I am sorry I don't, sir.

Mr. Evich: Could I ask Officer Gunn to get the name of the doctor for me, your Honor?

The Court: Do you wish to recall him?

Mr. Evich: Or Mr. Breen can get it. They are in the same office.

The Court: Is there any reason why you can't check that?

Mr. Guterson: No. Perfectly agreeable.

The Court: All right.

Mr. Evich: I have no further questions.

Mr. Guterson: I have no further questions.

The Court: All right.

(Witness excused.) [89]

MRS. HARRIETT JACOBS

upon being called as a witness for and on behalf of the defendant, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Mrs. Harriett Jacobs. J-a-c-o-b-s (spelling).

The Clerk: J-a-c-o-b-s (spelling)?

The Witness: Yes.

Q. (By Mr. Evich): Will you state your name?

A. Mrs. Jacobs.

Q. And your first name? A. Harriett.

Q. What is your first name? A. Harriett.

Q. Harriett Jacobs? A. Yes.

Q. And where do you live, Mrs. Jacobs?

A. 6530 Second N.W.

Q. And do you know the defendant, Florence Umbriaco?

A. Yes, I know her from a business way.

Q. How did you happen to meet her?

A. Well, she bought a dog from me, a poodle dog. [92]

Q. Do you raise dogs?

A. Yes, I do. That is my business.

Q. And she bought a poodle dog from you?

A. Yes, she did.

Q. And you became acquainted with her?

A. At that time, she bought the poodle that is how I know her.

Q. Calling your attention to December 11, 1956,

(Testimony of Mrs. Harriett Jacobs.)

last year—— A. (Interposing) Yes.

Q. (Continuing) ——did you see her on that date?

A. Yes, I remember it very plainly. She called me up crying that she was all beat up and if I would come over and as I was all ready to go to bed I got dressed and she said she was bleeding and you have to help somebody out like that.

Q. Did you go over there?

A. She was all beat up and looked terrible and was awfully intoxicated.

Q. How long did you stay there?

A. I stayed with her, she was trembling and crying and I took towels and washed her face and she was all blowed up from this beating. [93]

Q. Was she there alone?

A. She was all alone.

Q. What was her condition as to sobriety?

A. Well, she was awfully intoxicated and when I talked to her, why, she had been drinking heavily for a week.

Q. Was a doctor called? A. Pardon?

Q. Did you call a doctor for her?

A. No, she called the doctor and he was going to come up but it started snowing real heavy and he was going to come out in the morning.

Q. Did you leave then?

A. No, I didn't. I didn't leave until around—she didn't call up until around eleven. It was close to one o'clock in the morning. I stayed with her.

Mr. Evich: You may inquire.

(Testimony of Mrs. Harriett Jacobs.)

Cross Examination

Q. (By Mr. Guterson): Mrs. Jacobs, is it your testimony that the defendant called you at approximately eleven o'clock p.m. on the evening of December 11, 1956? A. Yes.

Q. And you remained with her from eleven o'clock in the evening until one o'clock in the [94] morning of December 12? A. Yes.

Q. Were you in the defendant's presence that morning of December 11?

A. No, but she called me right after seven and she had been drinking all night because I tried to stop her.

Q. Are you talking about eleven in the evening or in the——

A. (Interposing) About seven in the morning.

Q. You say she called you around seven o'clock?

A. In the morning.

Q. The morning of December 12? A. Yes.

Q. And you saw her the evening before, at eleven o'clock in the evening? A. Yes.

Q. You were not with her then during the day of December 11? A. No.

Mr. Guterson: No further questions.

Redirect Examination

Q. (By Mr. Evich): When was the next time you saw her, Mrs. Jacobs? [95]

A. I didn't see her after that at all.

Q. You didn't see her?

A. No, she called up and she was awfully intoxicated, worse than when I left her that night.

Mr. Evich: That is all.

Mr. Guterson: That is all.

(Witness excused.)

[Endorsed]: Filed November 26, 1957.

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the plaintiff herein, United States of America, through its counsel of record, Charles P. Moriarty, United States Attorney, and Murray B. Guterson, Assistant United States Attorney, and the defendant, Florence P. Umbriaco, through her counsel of record, John F. Evich, Esq., that on or about April 3, 1957, there was on trial before the United States District Court for the Western District of Washington, Northern Division, the case of United States of America vs. Frank Peter Umbriaco, WD Wash. ND Criminal Case No. 49580, for alleged violations of a section of the White Slave Traffic Act; that on April 3, 1957, one Florence Umbriaco was called by the plaintiff, United States of America, as a witness in said case.

It Is Further Stipulated and Agreed that said case was one in which a law of the United States authorizes an oath to be administered and further that the said Florence Umbriaco did take an oath before the United States District Court for the Western District of Washington, Northern Divi-

sion, in said case that she would testify and declare truly as a witness therein.

It Is Further Stipulated and Agreed that the transcript of the proceedings of the testimony of Florence Umbriaco in said case as certified to by Earl V. Halvorson, official court reporter for the United States District Court, Eastern and Western Districts of Washington, is a full, true and correct transcript of the entire testimony of Florence Umbriaco as given in said case, and is admissible in evidence in the above-entitled cause.

Dated this 10th day of September, 1957.

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney,
Of Counsel for Plaintiff.

/s/ JOHN F. EVICH,
Attorney for Defendant.

Admitted in Evidence September 10, 1957.

[Endorsed]: No. 15812. United States Court of Appeals for the Ninth Circuit. Florence Umbriaco, Appellant, vs. United States of America, Appellee. United States of America, Appellant, vs. Florence Umbriaco, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: December 7, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15812

FLORENCE UMBRIACO, Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee and
Cross-Appellant.APPELLEE AND CROSS-APPELLANT'S
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL

Comes Now the appellee and cross-appellant, United States of America, and designates for inclusion in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit the following documents, identified by name and number as described in the Certificate of Clerk, U. S. District Court to Record on Appeal, heretofore filed:

1. Indictment, filed April 10, 1957.

14. Verdict, filed September 11, 1957.

Minute entry of September 23, 1957, granting motion of defendant for judgment of acquittal as to Count I.

26. Notice of Appeal, filed October 17, 1957, by plaintiff.

Plaintiff's exhibits as follows:

1. Stipulation re testimony of Florence Umbriaco in Cause No. 49580.
2. Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580.
3. Registration record sheet, Stewart Hotel.
27. Plaintiff's Designation of Contents of Record on Appeal, filed November 1, 1957.
30. Court Reporter's Extract of Proceedings from trial, filed November 26, 1957, but only testimony of Condie M. May, Walter Hass, Marius Martell, Alfred G. Gunn, Edward Leo Breen, Jr., Vernon P. Coyne.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney,
Attorneys for Appellee and Cross-
Appellant.

[Endorsed]: Filed December 18, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Comes Now the appellant, Florence Umbriaco, and designates for inclusion in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit the following documents, identified by name and number as described in the Certificate of Clerk, U. S. District Court to Record on Appeal, heretofore filed:

23. Judgment and Commitment, filed September 30, 1957.

24. Notice of Appeal, filed September 30, 1957, by defendant.

25. Bond on Appeal, filed September 30, 1957 (\$2500.00, Michigan Surety Company).

29. Order Extending Time to December 15, 1957, for docketing record.

30. Court Reporter's extract of Proceedings from trial, filed November 26, 1957, but only testimony of Edward J. Denny, Gail Gordon Campbell, Thomas J. Hutchings, Harriett Jacobs.

31. Defendant's Designation of Contents of Record on Appeal, filed November 29, 1957.

/s/ JOHN F. EVICH,
Attorney for Appellant.

[Endorsed]: Filed January 3, 1958. Paul P. O'Brien, Clerk.

**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

FLORENCE UMBRIACO,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

FLORENCE UMBRIACO,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE AND CROSS-APPELLANT

CHARLES P. MORIARTY
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**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

FLORENCE UMBRIACO,
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**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

FLORENCE UMBRIACO,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

FLORENCE UMBRIACO,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE AND CROSS-APPELLANT

JURISDICTION

The appellee and cross-appellant accepts the statement of jurisdiction contained in the brief of appellant.

STATEMENT OF THE CASE

On April 3, 1957, at Seattle, Washington, the ap-

pellant, having been called as a witness by the United States and having taken an oath before the United States District Court for the Western District of Washington, Northern Division, in the case of *United States of America v. Frank Peter Umbriaco*, Western District of Washington, Northern Division, Criminal No. 49580, testified to material matters in that case involving charges of violating the White Slave Traffic Act. Title 18 U.S.C. § 2421 (Plaintiff's Exhibit 1, Tr. 78; Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580).

Subsequently an indictment was returned against appellant which was filed on April 10, 1957, charging her in two counts with committing perjury in violation of Title 18 U.S.C. § 1621. The perjury alleged in each count arose from her testimony in the trial of *United States v. Frank Peter Umbriaco, supra*. Count I charged that she perjured herself by testifying that during the eight-month period from June 1952 to February 1953 she did not operate as a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel in Seattle, Washington. Count II charged that she perjured herself by testifying that during the period from September 1954 to December 1955 she did not operate as a prosti-

tue (Tr. 3, 4). After trial of the cause, the jury on September 11, 1957, returned a verdict of guilty as to each count of perjury. Subsequently, on September 23, 1957, the trial court granted a motion of acquittal as to Count I (Tr. 6). On September 30, 1957, the appellant was sentenced to 18 months imprisonment (Tr. 7, 8).

The evidence offered by the Government on Count I of the indictment may be summarized as follows:

During the trial of Frank Peter Umbriaco, the appellant, testified as follows:

Q. During this eight-months period did you ever operate as a prostitute at the Stewart Hotel?

A. No.

Q. Did you ever perform any acts of prostitution at the Stewart Hotel?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 43)

The eight-month period referred to above was the eight-month period commencing in June 1952 and continuing to February 1953 (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 39-43).

Condie M. May, resident manager of the Stewart Hotel, testified that he was the official custodian of the records of the Stewart Hotel, identified Plaintiff's Ex-

hibit 3 as a registration sheet of the Stewart Hotel which was admitted into evidence, and testified that the registration sheet showed the registration of Frank and Mrs. LaMar at the Stewart Hotel for the dates of June 19 through 24, 1952 (Tr. 16, 17). The appellant and her husband were known at the Stewart Hotel during that period as Frank and Florence LaMar (Tr. 19).

Mr. Hass, a bellman at the Stewart Hotel, called appellant on the telephone at her Seattle home shortly after he met her at the Stewart Hotel. He asked the appellant to come to the hotel saying, "I have a deal for you." The appellant replied that she would come to the hotel. Mr. Hass called the appellant after a request by a guest at the hotel for a girl for purposes of prostitution. Shortly after the telephone call the appellant appeared at the hotel. Mr. Hass, who was operating the elevator, took her to the floor where the guest was awaiting her and escorted her to the room. Sometime later Mr. Hass saw the appellant in the elevator on her way out of the hotel and appellant gave him some money. On other occasions Mr. Hass saw the appellant at the Stewart Hotel (Tr. 19-22).

Marius Martell, a bellman at the Stewart Hotel during the period from June 1952 through February 1953, met Florence Umbriaco in the side lobby of the

Stewart Hotel during her stay at the hotel in June 1952. On that occasion Florence Umbriaco told him she was "working" and gave him her telephone number. About one month later, Mr. Martell called Florence Umbriaco at the telephone number given him on the previous occasion. He told her to come down to the hotel. She answered that she would be right down. Within a short time she came to the hotel. Mr. Martell testified that the reason for his calling her was that a guest wanted a girl for purposes of prostitution. Approximately one-half hour after Florence Umbriaco arrived at the hotel and had been directed to a certain room number, Mr. Martell met her again and Florence Umbriaco gave him some money. About two weeks later Mr. Martell called Florence Umbriaco at the same number and asked her to come to the hotel. The appellant said she would be right down. The reason Mr. Martell called her was again for purposes of prostitution with a guest in one of the rooms in the Stewart Hotel. Mr. Martell testified that he directed Florence Umbriaco to a particular room in the Stewart Hotel; that she went up to the room and immediately came down stating that no one was there (Tr. 25-30).

Mr. Alfred G. Gunn, a special agent of the Federal Bureau of Investigation, testified that he had a conversation with Florence Umbriaco during the night of November 3, 1956 (Tr. 50). Mr. Gunn related that

Florence Umbriaco advised him on that occasion that she came to Seattle in June 1952 with Frank Umbriaco and that upon her arrival she checked into the Stewart Hotel. Immediately thereafter Frank Umbriaco made arrangements with various bellmen for Florence Umbriaco to work as a prostitute while living at the Stewart Hotel. She told Mr. Gunn that she did work as a prostitute at the Stewart Hotel while she was there and while she and Frank lived in an apartment at the Cambridge Hotel from the latter part of June 1952 until February 1953. Florence Umbriaco advised Mr. Gunn that she worked as a call prostitute at the Stewart Hotel and several other hotels in Seattle during that eight-month period (Tr. 51, 52). Mr. Gunn further testified that he had a conversation with Florence Umbriaco on the morning of December 11, 1956, and again that Florence Umbriaco advised him that she practiced prostitution at various hotels in Seattle during the period June 1952 until February 1953, including operating as a prostitute at the Stewart Hotel.

Vernon P. Coyne, a special agent of the Federal Bureau of Investigation, testified that on June 12, 1957, in the presence of Edward Leo Breen, Jr., a special agent of the Federal Bureau of Investigation, Florence Umbriaco advised them that the statements which she had given Alfred G. Gunn were the absolute

truth. She further advised Mr. Coyne and Mr. Breen that during the period June 1952 until February 1953 she had worked as a call girl in the various hotels in Seattle and that prior to her testifying on April 3, 1957, in the *Frank Peter Umbriaco* case she had the bellboys who she thought were going to testify in that case come into her room and they discussed the testimony that they would give. In particular, in connection with a bellboy by the name of Kenny from the Stewart Hotel, Florence Umbriaco told Mr. Coyne and Mr. Breen that Kenny was only going to say that, "He called me twice and that is a laugh because I make my living that way and if he or any bellboy say they called me twice they are committing perjury because I made my living that way and how could I live unless they called me?" (Tr. 60-62)

Edward Leo Breen, Jr., a special agent of the Federal Bureau of Investigation, testified substantially the same as Mr. Coyne with regard to the conversation of June 12, 1957 (Tr. 66-68).

The evidence offered by the Government as to Count II may be summarized as follows:

From September 1954 through December 1955 Florence Umbriaco resided in the following places for the following periods of time: Four days at the Stewart Hotel in Seattle (Plaintiff's Exhibit 2, Court

Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 49); an apartment on 11th North in Seattle for a period of one year, and the Roygate Apartments at 705 East Thomas for a period of four or five months (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 50).

The testimony of Florence Umbriaco during the trial of Frank Peter Umbriaco which gave rise to the charge contained in Count II of the indictment is as follows:

Q. During the time you were living at the Stewart Hotel on this occasion in the fall of 1954, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. And then when you moved up to 11th North, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. During the time you lived there on East Thomas in the Roygate Apartments, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 57)

Edward J. Denny, a bellman at the Hungerford Hotel in Seattle, testified that during August 1954 he called Florence Umbriaco for the purpose of committing an act of prostitution with a guest at the Hungerford Hotel (Tr. 32). Upon her arrival at the hotel Mr. Denny directed her to a hotel room. Approximately one-half hour later Florence Umbriaco came down from the hotel room and on leaving the hotel gave Mr. Denny some money and told him that he could call her at any time (Tr. 33, 34). Mr. Denny testified that thereafter he called Florence Umbriaco five or six times during the four months following August 1954 for the purpose of prostitution at the Hungerford Hotel; that on each of those occasions he gave her a room number to go to and that when Florence was ready to leave she would call for him; that he would go to the hotel room, knock on the door, that they would meet in the elevator and on the way down she would give him money (Tr. 35, 36).

Gail Gordon Campbell testified that he was a janitor at the Washington Athletic Club; that he knew the defendant in this cause as Flo Andrews; that he met her during the end of 1953 at the Astor Hotel; and that he knew the defendant for a period of four years following his initial meeting with her (Tr. 38, 39, 40). Mr. Campbell testified that during the fifteen-month period commencing in September 1954

through December 1955 he had sexual intercourse with Florence Umbriaco for money approximately once each month; that on each occasion he paid her fifty dollars and that these acts of sexual intercourse occurred in different hotels in the city of Seattle (Tr. 40, 41).

Thomas Hutchings, a bellman at the Morrison Hotel, testified that he knew the defendant as Florence LaMar (Tr. 43, 44) and met her in 1953. Mr. Hutchings testified that during the period between September 1954 and December 1955 he was working at the Morrison Hotel as a bellman (Tr. 44); that during the period September 1954 to December 1955 he called Florence Umbriaco on the telephone on three or four occasions; that he called her on each occasion to perform an act of prostitution at the Morrison Hotel; that on each occasion she would arrive at the hotel approximately one-half hour after the telephone conversation; that he would direct her to a particular hotel room on each occasion and that generally one-half hour after taking her to a hotel room he would see her again at which time she would pay him money (Tr. 44, 45, 46).

Mr. Alfred G. Gunn, in connection with the charges contained in Count II of the indictment, testified that he had a conversation with Florence Umbriaco on November 3, 1956; that during this conversation she advised him that in September 1954 she and

Frank Umbriaco returned to Seattle from a trip they had made to Eureka, California; that they at that time resided at the Stewart Hotel for a few days during which time she immediately started practicing prostitution in Seattle. She told Mr. Gunn that after leaving the Stewart Hotel in September 1954 she and Frank Umbriaco lived on Capitol Hill at an address on 11th Street and subsequently in an apartment at 705 East Thomas; that during that period of time (the period of time involved in Count II) she worked as a prostitute at various hotels in Seattle, including the Hungerford, the St. Regis, the Morrison, the Stewart, and the Stratford (Tr. 52, 53). Mr. Gunn further testified that he had a conversation with Florence Umbriaco on the morning of December 11, 1956, and that on that occasion Florence Umbriaco told Mr. Gunn the same things that she had told him in her conversation with him on November 3, 1956, with regard to her coming back from a trip to Eureka, California, the places she lived, and the places she practiced as a call prostitute in the various hotels in Seattle (Tr. 54).

Mr. Vernon P. Coyne testified that on June 12, 1957, in the presence of Edward Leo Breen, Jr., Florence Umbriaco advised them that she had worked as a call girl during the period September 1954 to December 1955; that she worked out of the various hotels in Seattle. She further advised Mr. Coyne and Mr.

Breen that Gail Gordon Campbell, during the period September 1954 through December 1955, was a regular trick of hers whom she charged fifty dollars for each act of prostitution (Tr. 61, 62).

Edward Leo Breen, Jr., testified substantially the same as Mr. Coyne with regard to the conversation of June 12, 1957 (Tr. 67, 68, 69).

At the close of the evidence the defendant moved for acquittal as to each count charged. On September 11, 1957, the jury returned a verdict of guilty as to each count in the indictment (Tr. 5). On September 23, 1957, the Court granted the defendant's motion for acquittal as to Count I of the indictment (Tr. 6).

SPECIFICATION OF ERRORS

Cross-appellant submits that the trial court committed error in granting defendant's motion for acquittal as to Count I of the indictment for the reason that the evidence introduced by the plaintiff was sufficient to sustain the charge of perjury thereunder.

SUMMARY OF ARGUMENT

1. The trial court erred in granting Florence Umbriaco's motion for acquittal as to Count I of the indictment for the reason that the evidence introduced

by the Government was sufficient to sustain the charge of perjury therein contained.

In granting the motion for acquittal as to Count I the trial court concluded that the Government's evidence did not comply with the rule requiring the falsity of an accused's statement to be established by two independent witnesses or by one witness and corroborating circumstances. The Court's reasoning was that the Government's evidence was insufficient because there was no witness to testify to having performed any act of sexual intercourse for money with the defendant nor a witness to testify to having observed any act of sexual intercourse for money involving the defendant.

It is the Government's contention that the testimony of the bellmen, Hass and Martell, that Florence Umbriaco had conversations at the Stewart Hotel during the time involved soliciting their services to arrange future dates with guests at the hotel for purposes of prostitution and gave the bellmen her name and telephone number, that after telephone calls from these bellmen to obtain her services for a guest at the hotel to perform an act of prostitution she arrived at the hotel and went to the hotel room to which the particular bellman directed her and that one-half hour or so later she left after turning some money over to the bellman and asking the bellman to call her again, is di-

rect and positive testimony of overt acts from which the jury could infer Florence Umbriaco's actual belief when she testified.

2. The statements of the appellant which are excerpted on pages 6 - 9 of appellant's brief from Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, do not amount to admissions that she operated as a prostitute during the period alleged in Count II. Further, even if those statements did amount to admissions or a retraction of her denial that she operated as a prostitute during the period September 1954 through December 1955, it is clear that such would not excuse the false testimony given, for the offense of perjury is complete when a witness's statement has once been made.

3. There can be no question concerning the sufficiency of the evidence under Count II when it is realized that the testimony of the bellmen, Denny and Hutchings, similar to that described in 1 above, is direct testimony of overt acts from which the jury could infer Florence Umbriaco's actual belief when she testified.

Even were we to accept appellant's contention that the testimony of the bellmen is circumstantial, since it establishes the falsity of Florence Umbriaco's testimony in the particular charged in the *Frank Peter*

Umbriaco trial it is sufficient corroboration of the direct testimony of Gail Gordon Campbell that he performed acts of sexual intercourse for money with appellant during the period involved. Further, the corroborating evidence of Special Agents Coyne and Breen which supports Campbell's testimony clearly complies with the rule in perjury cases. The evidence introduced on Count II was sufficient to support the jury's verdict.

ARGUMENT

I.

The trial court erred in granting Florence Umbriaco's motion for acquittal as to Count I of the indictment for the reason that the evidence introduced by the Government was sufficient to sustain the charge of perjury therein contained.

Count I of the indictment charges that Florence Umbriaco committed perjury when she testified in the case of *United States v. Frank Peter Umbriaco* by stating that during the eight-month period from June 1952 to February 1953 she did not operate as a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel in Seattle, Washington. The evidence in support of the Government's position with regard to this count consists of

the direct testimony of Walter Hass and Marius Martell to the mode of operation of Florence Umbriaco as a prostitute at the Stewart Hotel during the eight-month period from June 1952 to February 1953. Further corroborating the testimony of the two bellmen was the testimony of the resident manager of the Stewart Hotel that Florence Umbriaco resided at the Stewart Hotel from June 19 to June 24, 1952, and the testimony of Alfred G. Gunn, Vernon P. Coyne and Edward Leo Breen, Jr., special agents of the Federal Bureau of Investigation, through conversations had with Florence Umbriaco when she admitted that she committed acts of prostitution at the Stewart Hotel during the alleged period.

It is of course the law in perjury cases that the prosecution must establish the falsity of the statement made by the accused by the testimony of two independent witnesses or by one witness and corroborating circumstances. *Weiler v. United States*, 1945, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495. It is further the law that circumstantial evidence alone, no matter how persuasive, is never enough to sustain a conviction. *Radomsky v. United States*, 180 F. 2d 781, 9 Cir., 1950, at page 783.

In order to grant the motion for acquittal as to Count I the lower court concluded that the Govern-

ment's evidence did not comply with the above rule. The Court's reasoning was that the Government's evidence was insufficient because there was no positive and direct evidence of perjury inasmuch as there was a failure to produce a witness to testify to having performed any act of sexual intercourse for money with the defendant during the period involved and at the place named and/or that the Government failed to produce a witness to testify to having actually observed any act of sexual intercourse for money involving the defendant. The question then is whether the failure to produce such testimony must necessarily operate to mean that there was no direct and positive evidence of the kind of perjury charged here. It is submitted that the failure to produce the kind of testimony referred to should not result in an acquittal.

It must be carefully kept in mind that the charge of perjury did not relate to an allegation of having given false testimony concerning whether any acts of sexual intercourse had occurred during a given period or on a particular occasion but instead related to whether or not Florence Umbriaco had operated as a prostitute during a given period or had performed any act of prostitution at the Stewart Hotel during a given period. If the charge was that there was willful false testimony concerning individual acts of sexual intercourse, then admittedly it would be nec-

essary to produce either an eye-witness to such act or a person who was so involved. But in the charge herein we are concerned with a course of conduct and an act of prostitution. With regard to the first part of Count I we are concerned with the activities and occupation of an individual over a period of time, not with any particular incident as such. In this view, how does the party charged with the burden of proof go about bringing in direct and positive evidence of a course of conduct or the nature of one's operations over a given period of time? With regard to the second part of Count I, what is direct and positive evidence of an act of prostitution?

In this case, inasmuch as we are concerned with Florence Umbriaco's operations as a prostitute and whether she performed an act of prostitution during the time and at the place alleged, it is first necessary to determine the meaning of that word or term. A prostitute is generally defined as a female given to indiscriminate lewdness or to promiscuous sexual intercourse for gain. See 34A *Words and Phrases* 507. One who operates as a prostitute would be one who engages in a course of conduct of indiscriminately giving herself to lewdness for gain. What is direct and positive proof of such conduct? It is submitted that direct and positive testimony of such conduct is testimony of conversations by Florence Umbriaco with a bellman at a

particular hotel; soliciting of the bellman's services for future dates for prostitution with guests at the hotel; giving of one's name and telephone number to the bellman; advising the bellman that one is available for prostitution; coming to the hotel immediately after being called by a bellman with whom the previous conversation occurred after having been called by him because a guest at the hotel desired a woman for the purpose of performing an act of prostitution; going to the room as directed by the bellman; turning some money over to the bellman a half hour to forty-five minutes later upon leaving the hotel; and the parting conversation with the bellman to the effect of "Call me again." All of the foregoing is the usual routine mode of operation of a prostitute or one engaged in operations as such. Each is an overt act from which the jury may infer the appellant's belief and the testimony of such acts in this case were positive and direct that Florence Umbriaco operated as a prostitute during the period in question.

With regard to her perjury in denying that she performed an act of prostitution at the Stewart Hotel during the period involved, the Court's reasoning was the same as related to the appellant's operations as a prostitute during the period involved, i.e., that the Government's case failed because there was no direct and positive testimony by a participant in an act of

sexual intercourse for money with the appellant and/or by one who observed such an act and that the evidence was circumstantial.

The distinction between what evidence is circumstantial and what evidence is direct is set forth in *Radomsky v. United States, supra*, at page 783, wherein this Court states in part as follows:

“Of course, the distinction between circumstantial and positive evidence must be taken in a practical sense. Thus, if a witness had testified to seeing someone other than appellant mail the letter it would be direct evidence that appellant did not mail it notwithstanding the necessity of an inference based on experience that a letter deposited in the mail by one person cannot, before arriving at its destination, have been deposited in the mail by another person. The possibility of the letter’s being mailed twice is so negligible that the evidence would be direct for all intents and purposes.”

Similarly in this case, at least in the practical sense referred to in *Radomsky*, direct evidence that Florence Umbriaco had conversations with bellmen at the Stewart Hotel during the time involved soliciting their services to arrange future dates with guests at the hotel for purposes of prostitution and giving the bellmen her name and telephone number to gain that end, that after telephone calls from these bellmen to obtain her services for a guest at the hotel to perform an act of prostitution she arrived at the hotel and went to the hotel room to which the particular bellman di-

rected her, and that one-half hour or forty-five minutes later she left after turning some money over to the bellman and asking the bellman to call her again, would be direct evidence that Florence Umbriaco operated as a prostitute during the period to which such testimony related and that on each particular occasion she performed an act of prostitution. Under such circumstances the possibility that she did not operate as a prostitute or that she did not perform an act of prostitution is so negligible that the evidence would be direct for all intents and purposes.

Of even more telling significance is the decision in the case of *United States v. Remington*, 191 F. 2d 246, 2 Cir., 1951, certiorari denied 343 U.S. 907, 72 S.Ct. 580, 96 L.Ed. 1325, which was concurred in by Judges Swan, Augustus N. Hand and Learned Hand. In that case the indictment charged the defendant with the offense of perjury in that he testified before a grand jury that he had never been a member of the Communist Party and that such testimony was wilfully and falsely given. As the Court points out, it is of course necessary in establishing the contrary to what the defendant testified to that there be some proof of his having joined the Communist Party. The Court then went on to discuss what would constitute direct and positive evidence of membership in the Commu-

nist Party and in so discussing, we believe, touched upon matters at page 249 that are pertinent here:

“Since the crime of perjury consists in the contradiction between the accused’s oath and his belief, the only ‘direct’ evidence of his guilt would seem to be his own declarations of his belief. But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated. This distinction was laid down in *United States v. Wood*, 14 Pet. 430, 10 L.Ed. 527, which has been often followed. Since only written declarations will suffice, it follows that if the critical issue must be proved by ‘direct’ evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused’s state of mind that must be proved by ‘direct’ evidence. And this view is confirmed by Chief Justice Vinson’s opinion in *American Communications Ass’n. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 690, 94 L.Ed. 925, where it said: ‘* * * while objective facts may be proved directly, the state of a man’s mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much ‘overt acts’ as the act of joining the Communist Party, there can be no successful prosecution for false swearing.’

“Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses

must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

It should be borne in mind that the issue is not whether or not appellant falsely denied performing an act or acts of sexual intercourse but whether or not she falsely denied operating as a prostitute and performing an act of prostitution at the Stewart Hotel during the period referred to. In connection with the proof required, the trial court concluded that the direct testimony required must establish all of the overt acts which comprise operation as a prostitute and an act of prostitution. But it is submitted that within the meaning of the *Remington* case, *supra*, not all of the overt acts in the kind of perjury here charged must be established by direct evidence but rather the direct testimony must relate to one or more of the overt acts which comprise an act of prostitution and operation as a prostitute from which the jury may infer the appellant's actual belief. Although the Second Circuit reversed in the *Remington* case, it reversed on the basis of the trial court's instruction to which proper exception was taken. No such exception was taken in this case and the trial court's instructions are not before this Court.

In the instant case if there was testimony to specific acts of sexual intercourse for gain it would simply be testimony of other overt acts which would

establish the operations of the defendant as a prostitute over the given period. We believe that there are many other overt acts which were in fact testified to herein and which fully justified the verdict of the jury as to Count I. Such overt acts were testified to directly and positively by the persons who had the meetings and conversations with the defendant. But even with regard to evidence of acts of sexual intercourse, it should be noted that although evidence of such is not direct it is present in this case through the admission of the appellant to which Special Agents Gunn, Coyne and Breen testified. The evidence introduced by the Government is such direct and positive evidence to sustain the burden which is placed upon the Government in perjury cases.

It is submitted that the Court below was in error in granting defendant's motion for acquittal as to Count I and this Court should reverse and remand this case as to Count I.

II.

The appellant in its brief, under the heading Assignment I, contends that the evidence introduced by the Government was insufficient to sustain the charge of perjury contained in Count II for the reason that the answers given by the appellant were legally truthful. In the appellant's brief on pages 7, 8 and 9, ex-

cerpts from the testimony of Florence Umbriaco given in the trial of Frank Peter Umbriaco are set forth. Apparently the appellant from these excerpts is contending that in her testimony she has admitted practicing prostitution within the period set forth in Count II.

The first excerpt, cited on page 7 of appellant's brief, from Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, page 52, contains the answer to a question as follows:

"No, I had a friend of mine a couple of times that came up to visit me there, but it wasn't an act of prostitution. -I wouldn't call it."

Clearly this is a denial of committing an act of prostitution and certainly does not amount to an admission that she operated as a prostitute during the period between September 1954 through December 1955.

The next excerpt from Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580 at page 56, cited on page 7 of appellant's brief, admits to having an act of sexual intercourse with an individual but does not admit that it was for money. She clearly states in answer to the question, "Was that for money?" "I don't know how you would want to class that. He has loaned me a great

deal of money during the years." Certainly the answer of appellant to the question posed does not indicate that any sexual intercourse she may have had with the friend referred to at that phase of her testimony was for money. In addition, the context of that entire excerpt from page 56 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, does not indicate that the witness Florence Umbriaco was admitting that she operated as a prostitute during the period September 1954 to December 1955.

The excerpt contained in appellant's brief from page 57 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, does not relate to the period between September 1954 and December 1955, but rather to the entire period from September 1952 to the time of the trial. Further, the entire testimony from the excerpt on pages 7 and 8 of appellant's brief, from page 57 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, did not amount to an admission that Florence Umbriaco operated as a prostitute during the period September 1954 to December 1955. The question asked encompassed a greater period of time than that involved in Count II and from the question and its context we cannot know whether she admitted sexual

intercourse for money with one person during the period involved in Count II or whether her admission related to the period within the question asked which was outside the period involved in Count II. Further, though she admits sexual intercourse for money with one person during the period asked in that particular question her answer in the context asked cannot be construed as an admission that she operated as a prostitute during the period referred to in Count II, but, if anything, confirms her earlier denial.

Again, on page 8 of appellant's brief, an excerpt is taken from page 62 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, wherein Florence Umbriaco admits that during the period between 1952 and 1956 she performed acts of sexual intercourse at the Washington Athletic Club. But neither from the question asked nor the answer given nor the context of her examination can the admission be related to the period of time with which we are concerned in Count II. Further, she does not admit that the sexual intercourse was for money. Clearly this does not amount to an admission that she operated as a prostitute during the specific period from September 1954 to December 1955 nor a repudiation of her earlier answer denying that she operated as a prostitute during this period.

With regard to the excerpt contained on page 8 of appellant's brief from page 63 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, again the question encompasses a much greater period of time than that involved in Count II and neither from the question asked nor the answer given nor the context of her examination can the admission be related to the period of time with which we are concerned in Count II. Clearly there can be no question that this is not an admission that she operated as a prostitute during the specific period from September 1954 to December 1955 nor a repudiation of her earlier answer denying that she operated as a prostitute during this period.

Turning now to the language in the indictment, the only testimony charged as false is that Florence Umbriaco testified falsely that she did not operate as a prostitute during the period between September 1954 and December 1955. That period was the time during which Florence Umbriaco lived at the Stewart Hotel, in an apartment on 11th North, and during the period of time she resided at the Roygate Apartments on East Thomas Street in Seattle (See Statement of Facts). The specific questions with regard to whether or not she operated as a prostitute during those periods are as follows:

Q. During the time you were living at the Stewart Hotel on this occasion in the fall of 1954, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. And then when you moved up to 11th North, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. During the time you lived there on East Thomas in the Roygate Apartments, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 57)

Taking the questions asked and the context in which they were asked, it is clear that the excerpts which appear on pages 6, 7, 8 and 9 of appellant's brief do not amount to even an indication that Florence Umbriaco at the time she was answering the questions lacked consciousness of the "nature of the statement made" or that it was "inadvertently made" or there was a "mistake of the import", or there was "lack of corrupt motive". *United States v. Rose*, 215 F. 2d 617, 622, 3 Cir., 1954. Taking those excerpts in the context in which they were asked they do not amount to liter-

ally accurate, technically responsive, or legally truthful answers within the meaning of *Smith v. United States*, 169 F. 2d 118, 6 Cir., 1948; *Hart v. United States*, 131 F. 2d 59, 9 Cir., 1942; *Fotie v. United States*, 137 F. 2d 831, 840, 8 Cir., 1943; *United States v. Slutzky*, 79 F. 2d 504, 505, 3 Cir., 1935; *Allen v. United States*, 194 Fed. 664, 668, 4 Cir., 1912. Neither do these answers amount to admissions or a retraction.

Even if the answers given to the questions excerpted on pages 7, 8 and 9 of appellant's brief could be construed as amounting to a retraction of the testimony charged as false, it is clear that such does not excuse the false testimony given. *United States v. Margolis*, 138 F. 2d 1002, 1003, 3 Cir., 1943; *Llanos-Senarillos v. United States*, 177 F. 2d 164, 9 Cir. 1949; 41 *Am. Jur.*, Perjury § 7, p. 7; *United States v. Rose*, 113 F. Supp. 775, USDC Pa., 1953, reversed on other grounds, 215 F. 2d 617.

In this connection, *United States v. Norris*, 1936, 300 U.S. 564, 574, 57 S.Ct. 535, 81 L.Ed. 808, states as follows:

“Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury, and the crime is complete when a witness's statement has once been made.”

And further at page 576:

“The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law.”

III.

The appellant apparently contends on the one hand that there has been no direct proof of some element of the crime for which the defendant has been tried and that the verdict is therefore contrary to law and to the evidence (appellant's brief, p. 10), and on the other hand appellant apparently suggests that the only direct evidence is that of Gail Gordon Campbell and there is no corroboration within the requirements of the perjury rule.

It is submitted that the falsity of the statement made by Florence Umbriaco and charged under Count II has been established by three witnesses: Gail Gordon Campbell, Edward J. Denny, and Thomas Hutchings. The testimony of Gail Gordon Campbell that he performed acts of prostitution with appellant during the period in question on a monthly basis and paid her fifty dollars on each occasion cannot seriously be questioned as directly and positively establishing that Florence Umbriaco operated as a prostitute during the period in question. With regard to the bellmen

Denny and Hutchings, their testimony is direct and positive to the overt acts from which the jury could infer that Florence Umbriaco knew her answers to the questions asked were false within the meaning of the *Remington* case, *supra*.

Even if we were to assume that the testimony of the bellmen was circumstantial and considered such testimony in connection with the sufficiency of the corroboration of Gail Gordon Campbell, the strict requirements of the perjury rule have been met. It is clear that circumstantial evidence is sufficient to corroborate the testimony of the single direct witness where that rule is applicable in a perjury case. *United States v. Marachowsky*, 201 F. 2d 5, 15, 7 Cir., 1953; 73 S.Ct. 830, 97 L.Ed. 1368, certiorari denied, 345 U.S. 965; *United States v. Hiss*, 185 F. 2d 822, 2 Cir., 1950; certiorari denied, 345 U.S. 942, 73 S.Ct. 830, 97 L.Ed. 1368; *United States v. Seavey*, 180 F. 2d 837, 3 Cir., 1950, certiorari denied, 339 U.S. 979, 70 S.Ct. 1023, 94 L.Ed. 1383. The problem arises with regard to the nature of the corroboration.

In *United States v. Palese*, 133 F. 2d 600, 3 Cir., 1943, at the trial of the defendant on perjury charges, the Government called three witnesses. The stenographer who took the notes at the grand jury proceeding testified that the defendant stated under oath

to the grand jury that he did not pay any person for voting at the November 5, 1940 general election. A Leon Wheatley testified that while on his way to the polls to vote some time between three and five o'clock P. M. on November 5, 1940, he met the defendant, whom he knew, and who said to him "I got \$2 if you want to vote." Wheatley testified further that the defendant then handed him a ballot and that he voted that ballot, and that after he left the polls he walked across the street with the defendant who then gave him \$2 for his vote.

The third witness, Edna Jackson, testified that the defendant called for her in his car the morning of November 5, 1940, and asked whether she was going to vote, gave her a ballot which she did not examine and drove her to the polls; that she voted the ballot given her; that the defendant drove her home and on the way gave her \$1.50 and that the defendant did not owe her any money. The witness, replying to the court's question "Did he give you \$1.50 to vote?" answered "No, sir," and to the further question "For what purpose did he give you the \$1.50?" answered "I do not know."

The defendant appealed in that case contending that the Government's evidence did not meet the stand-

ards required in perjury cases. The Court said at page 602:

“It is, therefore, settled for us that the oral testimony of one witness is insufficient unless corroborated to sustain a conviction for perjury. We note, however, that the rule, although thus firmly established in the federal courts, has been subjected to much well reasoned criticism. 7 Wigmore on Evidence, 3rd Ed., §§ 2040-2043; *Marvel v. State*, 1925, 33 Del. 110, 3 W. W. Harr. 110, 131 A. 317, 42 A.L.R. 1058. Thus in *Goins v. United States*, 4 Cir., 1938, 99 F. 2d 147, 149 the court said: ‘It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes * * *. The old “oath against oath” reasoning of the earlier decisions is without force now that the defendant is allowed to take the stand and that corroboration sufficient to satisfy the jury of the falsity of the oath may well arise from his demeanor and manner of testifying.’ See also *State v. Storey*, 1921, 148 Minn. 398, 182 N.W. 613, 15 A.L.R. 629 in which the court points out with great force that it is inconsistent to hold that evidence which is of the quality sufficient to hang a man for murder is insufficient to convict him of perjury.

* * * * *

“It is true, as the defendant urges, that this testimony did not corroborate Wheatley’s testimony that the defendant had paid him, Wheatley, for voting. But the payment to Wheatley, the individual, was not the crucial fact. Mrs. Jackson’s testimony, if believed, did tend, as did Wheatley’s, to establish the fact that the defendant did pay persons for voting. It, therefore, was sufficient to corroborate the only material fact established

by Wheatley's testimony, namely, that the defendant's assertion that he had not paid any person for voting was false."

And again at page 603, the Court stated:

"It may be conceded, as contended by the defendant, that the evidence relied upon by the Government as corroborative of Wheatley's testimony does not meet the standard for corroborative evidence laid down in *Williams v. Commonwealth*, 1879, 91 Pa. 493, namely, that the particular circumstances testified to as indicating falsity must be corroborated and not merely the falsity of the oath itself. That standard, in our opinion, is unnecessarily rigorous. The exceptional rule of evidence applicable to the proof of perjury is itself, as we have noted, subject to well grounded criticism. We think it would be highly undesirable to intensify the rigor of the rule by engrafting upon it the strict standard laid down in the *Williams* case as to the nature of the evidence which can be accepted as corroborative. We prefer the more liberal application of the rule made in the *Hare* and *Davis* cases, since we think they represent the better view. As we have already indicated, the evidence in the present case meets the test of these cases. It was, therefore, sufficient to support the verdict of guilty."

The issue decided in *Palese, supra*, has not been decided in this Circuit. *Vetterli v. United States*, 198 F. 2d 291, 9 Cir. 1952, judgment vacated on other grounds, 344 U.S. 872, 73 S.Ct. 175, 97 L.Ed. 675. It was, however, raised in that case in circumstances similar to the instant case.

In *Vetterli, supra*, the defendant was charged in two counts with perjury involving testimony before a grand jury. Count I charged that the defendant knowingly denied that he had furnished money to anyone to go to Japan. In support of the conviction, the Government introduced the testimony of a witness, Miwa, that the defendant had given Miwa money to purchase passage on a ship to Japan, that Miwa had used the money for that purpose and actually reached Japan. This Court said at page 292, in connection with the corroboration:

“However, appellant, while conceding this, maintains that the so-called corroborating evidence relied on is insufficient. The question asked and the answer given in response by appellant were so broadly phrased as to potentially cover a number of transactions in which appellant might have been involved in furnishing money to different persons to go to Japan. By witness Miwa’s testimony there was established the occurrence of a single transaction — the furnishing of money to the witness. There is then, posed in the case, a question of whether the corroborating evidence, in order to be sufficient, must tend to establish the same transaction to which the direct witness testified or whether it may show other transactions within the purview of the question asked by the grand jury and thus corroborate the testimony of the direct witness in only a very general sense because it similarly tends to show the falsity of the oath.”

This Court said that it was not required to meet this situation head on because the evidence other than

Miwa's testimony substantiated the single transaction to which he testified. One item of the corroborating evidence was testimony by a Federal Bureau of Investigation agent that after the indictment had been returned against the defendant he had related to the agent facts substantially similar to testimony of the Miwas and admitted that he had given Miwa money for the expenses of their trip to Japan. The appellant in that case contended that his extra-judicial admission was insufficient as a matter of law to serve as a corroborative element of the testimony of Miwa. This Court stressed the fact that the admission was part of the corroborative evidence and not solely relied on to establish guilt. This Court further stated at page 293:

“We stress the fact that the admission was part of the *corroborative* evidence and not solely relied on to establish guilt. The rule of proof required in perjury cases prescribes that the uncorroborated testimony of one witness is insufficient; it does not ‘* * * relate to the kind or amount of other evidence required * * *.’ In the event the corroborative evidence ‘substantiates’ the testimony of the single witness it is sufficient. Admissions of a party charged with perjury, if made under such circumstances as render them clearly admissible, seems to us to have a sound corroborative value.”

This Court further added:

“In other than perjury cases it has been held that the weight of the corroborative evidence supporting a confession need not of itself establish guilt

beyond a reasonable doubt, that it suffices if taken together with the confession such result is achieved. In jurisdictions which hold the uncorroborated testimony of an accomplice insufficient to convict, admissions of the accused have been held sufficient corroboration, and the converse proposition is recognized where corroboration of a confession is required. We do not believe an extra-judicial admission made by an accused is insufficient as corroboration simply because it is such."

In this case the situation is similar. Here there is corroboration in the form of admissions testified to by Special Agents Breen and Coyne which substantiates the testimony of Gail Gordon Campbell and in addition there is the testimony of Special Agent Gunn and the bellmen Denny and Hutchings which establishes the falsity of Florence Umbriaco's oath. See also *Doan v. United States*, 202 F. 2d 674, 9 Cir., 1953.

Whether the characterization of the testimony of the bellmen is as circumstantial or direct there is ample evidence to support the jury verdict on Count II.

CONCLUSION

The appellee and cross appellant submits that this Court should affirm the conviction of Florence Umbriaco on the charge of perjury under Count II of the Indictment, and it further submits that the trial court committed error when it granted Florence Umbriaco's motion for acquittal as to Count I of the indictment and that this Court should reverse and remand as to Count I.

Respectfully submitted,

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No. 15812

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FLORENCE UMBRIACO,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The appellant, Florence Umbriaco, testified as a witness in the case of *United States of America v. Frank Umbriaco*, in the U.S. District Court and was thereafter charged by indictment with two counts of perjury (Tr. 3) for the alleged violation of Section 1621, title 18, U.S.C.

Section 3231, title 18, U.S.C. vests original and exclusive jurisdiction of all offenses against the laws of the United States in the District Courts of the United States.

Section 1291, title 28, U.S.C. places jurisdiction of appeals from all final decisions of the District Court in the Court of Appeals.

STATEMENT OF THE CASE

The appellant, Florence Umbriaco, was called as a witness for the plaintiff in the case of *United States v. Frank Umbriaco*, who was being tried on charges of White Slave traffic act, title 18, U.S.C. Sec. 2421.

Appellant was charged, tried and convicted in the U.S. District Court, Western District of Washington, Northern Division, for the crime of perjury alleged to have been committed in the trial of *United States v. Frank Umbriaco*.

In Count I, appellant is alleged to have stated on April 3, 1957, under oath (Tr. 3: (a) that during the 8-month period from June 1952 to February 1953, she did not operate as a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel.

In Count II, appellant is alleged to have stated on April 3, 1957, under oath (Tr. 4):

(a) That during the period from September, 1954, to December, 1955, she did not operate as a prostitute. The evidence offered by the Government is as follows:

Condie M. May, clerk of the Stewart Hotel, identified plaintiff's exhibit 3, which is a partial record of guests at the hotel (Tr. 17) and that record showed Frank and Mrs. LaMar were registered at the hotel from June 19 to June 24, 1952 (Tr. 17, Pl. Ex. 3).

Walter Hass testified that he was a bellman at the Stewart Hotel and had been a bellman there for "going on seven years" (Tr. 19); that he worked the night shift, that he knew the defendant as Florence LaMar; that he called her to come down to the Hotel, that he had a deal for her, that she did come down to the Stewart Hotel (Tr. 20), that he took her to the room, did not enter, next saw her in the elevator (Tr. 2).

Marius Martell testified he was a bellman at the Stewart Hotel seven years, met the defendant (Tr. 25), called the defendant because somebody wanted a girl, met her at the Hotel, gave her a room number and she left (Tr. 28), saw her half an hour later. He called her about two weeks later (Tr. 29), and when she came

down from upstairs, said "there was nobody there" (Tr. 30).

Edward J. Denny testified he was a bellman at the Hungerford Hotel, met defendant in August, 1954, knew her as Flo, called her five or six times (Tr. 34, 35).

Mr. Campbell testified he was a janitor at the Washington Athletic Club, knew the defendant, met her near end of 1953, knew her four years, knew her between September, 1954, and December, 1955, had sexual intercourse with her for money (Tr. 40, 41).

Thomas Hutchings testified that he was a bellboy at Morrison Hotel three and one-half years knew the defendant, called her about three or four times (Tr. 45, 46).

Alfred Gunn testified he was an F.B.I. agent, met defendant at F.B.I. office in Seattle, that defendant admitted she worked as a prostitute during period at Stewart Hotel and during period charged in Count II (Tr. 52, 53).

Vernon P. Coyne testified he was a special agent for the F.B.I., met the defendant June 12, 1957, at George's Cafe; Special Agent Breen was there; defendant admitted practicing prostitution (Tr. 60, 61). Edward Leo Breen, Jr., testified he met defendant at George's Cafe

on June 12, 1957; defendant admitted being a prostitute (Tr. 68).

At the close of the evidence, defendant moved for a motion of acquittal as to both counts. Jury found the defendant guilty on both counts (Tr. 5), and on the 23rd day of September, 1957, the court granted the motion of acquittal as to Count I, but denied it as to Count II (Tr. 6).

SPECIFICATION OF ERRORS

The appellant specifies the following errors upon which she relies to reverse the judgment and sentence.

I. The evidence was insufficient to sustain the charge of perjury for the reason that the answers were legally truthful.

II. That the entire evidence of the plaintiff was purely circumstantial and no direct and positive evidence to the alleged falsity of defendant's testimony was produced and said evidence was therefore insufficient as a matter of law to sustain a verdict of guilty.

III. That the verdict is contrary to law and the evidence.

ARGUMENT

Assignment I.

The evidence was insufficient to sustain the charge of perjury for the reason that the answers were legally truthful.

In Count II appellant is charged with making false statements.

That during the period from September, 1954, to December, 1955, she did not operate as a prostitute. This period is covered on her return from Eureka, California, when she moved into the Stewart Hotel for a few days in the Fall of 1954, and then moved to 11th Ave. North for about one year and the Roygate Apartments four or five months (Pl. Ex. 2, pg. 14, 15).

The precise question "Did you operate as a prostitute?" is a question calling for a conclusion. To operate as a prostitute may mean one thing to one person and something different to another. In order to convict a person of being a prostitute the elements of what constitute prostitution must be proved. Prostitution has been defined in various ways by various courts. Words & Phrases 34A. We must therefore examine defendant's entire answers in order to arrive at her guilt or innocence. If her answers amount to an admission of the

elements of prostitution, then she is innocent of the charge in Count II. Earlier in her testimony (Pl. Ex. 2, page 52) she answered:

“A. No, I had a friend of mine a couple of times that came up to visit me there, but it wasn’t an act of prostitution. I wouldn’t call it.”

It is apparent from her answer that she was at a loss to classify her relationship with this man, therefore, it was necessary for the plaintiff to ask her if she had intercourse and was the intercourse for money. In Pl. Ex. 2, page 56, she gave the following answers:

“Q. During the entire time you lived on 11th North, did you perform any acts of prostitution?”

A. Well, I saw this friend of mine a few times.

Q. Well, was that for the purpose of having sexual intercourse for money?

A. Well, sometimes I would see him, and we didn’t have sexual intercourse. We were friends.

Q. Sometimes did you?

A. Yes.

Q. Was that for money?

A. I don’t know how you would want to class that. He has loaned me a great deal of money during the years.”

And on page 57, Pl. Ex. 2:

“Q. Did you perform any acts of prostitution?”

A. Well, I saw this friend of mine a couple of times, I think, while I was living there, if I remember right.

Q. Is this the same individual you referred to earlier?

A. Yes.

Q. Is it your testimony, then, that the entire time after you came back to Seattle, in September, 1954, you only had sexual intercourse for money with one person?

A. Yes."

And on page 62 (Pl. Ex. 2):

"Q. During any period between 1952 and 1956, that you have been in Seattle, Florence, did you ever perform any acts of prostitution at the Washington Athletic Club?

A. This friend of mine worked at the Washington Athletic Club.

Q. Did you perform any acts of prostitution at the Washington Athletic Club?

A. I have met a couple of friends of mine there, yes.

Q. For purposes of having acts of sexual intercourse?

A. Yes."

And on page 63 (Pl. Ex. 2):

"Q. Did you, during this period between 1952 and 1956, when you were in Seattle, perform any acts of prostitution at the St. Regis Hotel?

A. Yes."

And on page 64 (Pl. Ex. 2) :

“Q. During this entire period from 1952 until 1956, Florence, did you ever give any of the money that you received for acts of sexual intercourse to Frank Umbriaco ?

A. No.

Q. Did you ever turn over any of the earnings you made as a prostitute to him ?

A. No. I have paid bills and things.”

I submit that defendant, in her testimony, has admitted practicing prostitution within the period set forth in Count II and that under the holding of *Smith v. U. S.*, 169 F 2d 118, pg. 121, “There can be no lawful conviction in a perjury case when an answer of the defendant under oath to a question propounded to him is literally accurate, technically responsive, or legally truthful.”

Hart v. U. S., 9 Cir., 131 F 2d 56, 71 ;

Fotie v. U. S., 8 Cir., 137 F 2d 831, 840 ;

U. S. v. Slutzky, 3 Cir., 79 F 2d 504, 505 ;

Allen v. U. S., 4 Cir., 194 F 644, 668.

In *U. S. v. Rose*, 215 F 2d 617, 622 :

“Perjury is the willful, knowing and giving under oath, of false testimony material to the issue or point of inquiry. An essential element is that the defendant must have acted with a criminal intent—he must have believed that what he swore to was false and he must have intent to deceive. If there

was lack of consciousness of the nature of the statement made or it was inadvertently made, or there was a mistake of the import, there was no corrupt motive.”

ARGUMENT

Assignments II and III.

There has been no direct proof of some element of the crime for which the defendant has been tried and the verdict is contrary to law and evidence.

The charge placed the burden on the plaintiff below to prove that the testimony given by the appellant (Pl. Ex. 2) was false beyond a reasonable doubt by positive and direct evidence of one witness and corroborating circumstances.

The law is clear and universal that to convict the defendant of the charge of perjury, the Government has the burden of proving by direct and positive evidence of two witnesses or by one witness and corroborating evidence the falsity of the defendant’s testimony, and the corroborating evidence must independently establish the falsity of defendant’s testimony. Circumstantial evidence alone is insufficient to sustain a conviction of perjury.

In *Radomsky v. United States* (Seattle case) 180 F 2d 781, the court held, on page 782:

“in order to sustain a conviction of perjury, there

must be direct and positive evidence of the falsity of the statement under oath, and that circumstantial evidence of such falsity, no matter how persuasive, was insufficient.”

On page 783, the court further stated:

“Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a circumstance is usually present when another certain circumstance or set of circumstances is present.

“Direct evidence establishes the fact to be proven without necessity for such inference.”

In *People v. O'Donnell*, 132 CA 2d 840, 283 Pac. (2) 714, page 717 is stated:

“Perjury requires a higher measure of proof than any crime known to the law. . . .”

In *Spaeth v. U. S.*, 218 Fed. (2) 361, the court held:

“Falsity cannot be proved by circumstantial evidence alone nor by the uncorroborated testimony of one witness.

“The rule requiring the evidence of two witnesses for a conviction was designed to make convictions for perjury more difficult to obtain than in the case of most crimes.”

In *Cuesta v. United States*, 230 F. (2d) 704, the court held:

“It is general rule that to authorize conviction for perjury, falsity of statement alleged to have been made by defendant must be established either by testimony of two independent witnesses, or by

one witness and by independent corroborating evidence which is inconsistent with innocence of the accused.

“A conviction for making false statements under oath requires evidence in addition to extra judicial admissions of defendant as to statement’s falsity.”

In *Dato v. United States*, 223 F. 2d 309, the court held:

“Perjury cannot be proved by uncorroborated testimony of one witness, since falsity of one person’s oath cannot be established by another person’s oath alone.”

In *United States v. Neff*, 212 F. (2d) 297, the court held:

“Where the government seeks to establish perjury by testimony of one witness and corroborating evidence, such evidence must be independent of witness testimony and inconsistent with innocence of the defendant.

“Evidence Aliunde is evidence which tends to show perjury independently.” (See also *U. S. v. Rose*, 215 F. 2d 617).

On page 306, the court held:

“In prosecution for perjury the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidenced by the testimony of two independent witnesses or one witness and corroborating evidence, and in absence of such proof the defendant must be acquitted. *To sustain a conviction of perjury, the evidence must be strong, clear, convincing and direct.*”

The rule has been approved and affirmed by the Su-

preme Court of the United States in *Weiler v. U. S.*, 323 U.S. 606, where the case of *Allen v. U. S.* (CCA 5) 194 F 664, 39 LR.A. (NS) 385, is cited and approved, also in *Hammer v. U. S.*, 271 U.S. 620, and in *U. S. v. Wood*, 14 Pet. 430, 10 L.Ed. 527. It is universal in all our Federal Courts.

The legal question therefore is to be answered by the application of the rule in perjury to the testimony and evidence admitted to prove the *factum probandum*. If the subject matter has been proved by direct and positive evidence, the requirements of the law have been met. If it does not measure up to the requirements of the rule, the plaintiff has failed and as was stated in *U. S. v. Otto*, 54 F (2d) 227 (CCA 2):

“The subject matter was susceptible of direct proof although we may well assume that no such proof was obtainable. Inability or failure for any reason to produce it at this trial left a charge capable in its nature of being proved by direct and positive evidence wholly unproved by such evidence and so unproved as a matter of law.”

Direct evidence being absolutely necessary to prove guilt in a perjury case and circumstantial evidence standing alone being insufficient to convict, then we must analyze what is direct and what is circumstantial and the distinction between the two.

20 Am. Jur. 1071, Sec. 1218:

“The advantage of positive evidence is that *it is the direct testimony of a witness to the fact to be proved*, who, if he speaks the truth, *saw and heard* the transaction; and the only question is whether he is entitled to belief.” (Emphasis ours)

Wigmore in his commentaries on evidence, Vol. 1, page 399, Sec. 25:

“As a matter of course and from necessity, all judicial evidence must be either direct or circumstantial. When we speak of a fact as established by direct or positive evidence, we mean that it has been testified to by witnesses as having come under the cognizance of their senses and of the truth of which there seems to be no reasonable doubt or question; and when we speak of a fact as established by circumstantial evidence, we mean that the existence of it is fairly and reasonably to be inferred from other facts in the case.”

When the above-stated principles are applied, it is defendant's contention that the testimony was insufficient to sustain the conviction, and she is entitled to a verdict of acquittal.

The only witness who testified that he had sexual intercourse for money with the defendant during the period stated in Count II was Gail Gordon Campbell. This relationship was admitted by the defendant. So defendant is faced with a charge of perjury on the testimony of one witness and other witnesses whose evidence

was not relevant to or corroborative in any respect to Campbell's testimony. The evidence of the bellmen is purely circumstantial. None of them saw defendant perform acts of sexual intercourse, none of them saw defendant receive money from any man, none of them gave her money to perform an act with anyone, and none of them knew definitely the time. The other evidence produced was evidence of the agents for the Federal Bureau of Investigation, showing that the defendant had admitted to them of being a call girl prostitute. The evidence of the bellmen and the F.B.I. agents was an attempt by the plaintiff to comply with the one witness rule plus corroborating evidence. Is this corroborative evidence under the rule? "When the court speaks of corroborative evidence, they mean *evidence aliunde*—evidence which tends to show perjury independently."

McWhorter v. U. S., 5 Cir., 193 F 2d 982, 985;
United States v. Hiss, 2 Cir., 185 F 2d 822;
United States v. Neff, 3 Cir., 212 F 2d 297, 307.

The corroborative evidence did not independently establish the perjury charged. The mere going to a hotel room on the call of a bellman does not establish prostitution.

“Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead directly to the inevitable — not merely probable—conclusion of falsity.”

U. S. v. Neff, supra.

The testimony of the F.B.I. agents is controlled by the ruling in the case of *Hart v. U. S.*, 131 F 2d 59, 61:

“These statements attributed to appellant were not made under oath, while her statements to the Internal Revenue agent and in open court were under oath. In view of the strong presumption of innocence, and because of the solemnity of the oath, credit must be given to what the defendant said under oath, rather than to what ‘she’ may have said to the contrary when not under oath.” *Clayton v. U. S.*, 284 Fed. 540.

CONCLUSION

The Government's evidence in this case is wholly insufficient to meet the stringent rules required in a perjury case.

Therefore, the verdict should be set aside and judgment of acquittal rendered.

Respectfully submitted,

JOHN F. EVICH

Attorney for Appellant,

Florence Umbriaco.

No. 15815

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GRACE H. CUNNINGHAM, EUGENE F. CUN-
NINGHAM and GRACE H. CUNNINGHAM,
Respondents.

Transcript of Record FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK

Petitions to Review a Decision of the Tax Court
of the United States

No. 15815

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COMMISSIONER OF INTERNAL REVENUE,
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**Petitions to Review a Decision of the Tax Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 55090

GRACE H. CUNNINGHAM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1954

- Oct. 22—Petition received and filed. Taxpayer notified. Fee paid.
- Oct. 22—Copy of petition served on General Counsel.
- Nov. 22—Answer filed by G. C.
- Nov. 22—Request for hearing in Seattle, Wash., filed by G. C.
- Nov. 29—Notice issued placing proceeding on Seattle, Wash., calendar. Service of answer and request made.

1956

- Mar. 14—Hearing set May 14, 1956, Seattle.
- May 17—Hearing had before Judge Atkins on the merits on joint oral motion to consolidate dockets 55090-91 for trial and opinion, granted. Stipulation of facts filed at hearing. Briefs 7/16/56. Replies 8/15/56.
- June 6—Transcript of hearing 5/17/56 filed.
- June 12—Correction of stipulation of facts filed.

1956

- July 11—Brief filed by Petitioner. 7/17/56 served.
July 16—Brief filed by Respondent. 7/17/56 served.
Aug. 14—Reply Brief filed by Petitioner. 8/15/56 served.
Aug. 16—Reply Brief filed by Respondent. 8/17/56 served.

1957

- June 17—Findings of fact and opinion filed, Atkins, J. Decision will be entered for Petr., served 6/17/57.
June 25—Decision entered, Judge Atkins, Div. 7, served 6/26/57.
Sept. 16—Petition for review by U. S. Ct. of Ap., 9th Cir., filed by Resp.
Oct. 2—Proof of service filed (counsel).
Oct. 1—Motion by resp. for extension of time for filing record on review and docketing pet. for review to Dec. 13, 1957.
Oct. 2—Order extending time for filing record on review and docketing petition for review to Dec. 15, 1957, entered, served 10/3/57.
Oct. 2—Proof of service on Petr.
Dec. 9—Designation of contents of record on review with proof of service thereon, filed.

The Tax Court of the United States

Docket No. 55091

EUGENE F. CUNNINGHAM and GRACE H.
CUNNINGHAM, Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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1954

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Nov. 22—Answer filed by G. C.

Nov. 22—Request for hearing in Seattle, Wash., filed by G. C.

Nov. 26—Notice issued placing proceeding on Seattle, Wash., calendar. Service of answer and request made.

1956

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May 17—Hearing had before Judge Atkins on the merits on joint oral motion to consolidate dockets 55090-91 for trial and opinion, granted. Stipulation of facts filed at hearing. Briefs 7/16/56. Replies 8/15/56.

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1956

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July 11—Brief filed by Petitioner. 7/17/56 served.
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Aug. 14—Reply Brief filed by Petitioner. 8/15/56 served.
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The Tax Court of the United States

Docket No. 55090

GRACE H. CUNNINGHAM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:S:AA:90D-JEQ:MHB-JEQ:MEB-fb) dated August 25, 1954, and as a basis for his proceeding alleges as follows:

1. The petitioner is a married woman whose residence address is 2026 Louisa Street, Seattle, Washington. The return for the period here involved was filed with the District Director of Internal Revenue at Tacoma, Washington, formerly known as the Collector of Internal Revenue.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1954.

3. The taxes in controversy are alleged income for the calendar year of 1946 and in the amount of \$6,725.59.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in adding to net income of the taxpayer for the taxable year ending December 31, 1946, the sum of \$14,714.60 as rental income which purported to represent the alleged fair market value of improvements erected by lessee on taxpayer's (lessor's) leased lands under the terms of a written lease.

(b) The Commissioner erred in holding that the improvements placed upon taxpayer's (lessor's) real property by lessee under terms of a written lease constituted rental to the lessor.

(c) The Commissioner erred in failing to find that the lease made no provision whatsoever for rental and that it was the agreement between the parties that there would be no rental other than payment of taxes.

(d) The Commissioner erred in failing to hold as a matter of law that the improvements erected by lessee became, by reason of being annexed to the freehold, the property of the taxpayer immediately upon completion of the improvements.

(e) The Commissioner erred in determining the fair market value of the improvements by using an arithmetical formula which gave no consideration to the many factors that go to make up fair market value.

(f) The Commissioner erred in failing to determine the amount of fair rental for the lands described in the lease for the period of the leasehold.

(g) The Commissioner erred in holding that the principal consideration for the lease was an agreement to transfer to taxpayer all of lessee's improvements at the expiration of the lease.

(h) The Commissioner erred in not holding that the true consideration for the lease was the agreement on behalf of the lessee to pay taxes.

(i) The Commissioner erred in holding that there was a liquidation of lease rental in kind where under the terms of the lease no lease rental, other than taxes, was required.

(j) Under the facts in this case the Commissioner erred in assessing any deficiency on any ground whatsoever.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a, b, c) There was a written lease executed covering Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Pierce County, Washington, running between Grace H. Cunningham, as lessor, and the American Manufacturing Company, as lessee, in which lease there was no provision for rent other than the payment of taxes. The period of the lease was six years. The minutes of the American Manufacturing Company relating to said lease specifically recite that there was to be

no rent charged other than payment of taxes, which taxes average approximately \$46 per month during the life of the lease. There was no statement in the lease nor in the minutes of the corporation, nor was it the intent of the parties that the building erected upon the leased premises by the lessee was in lieu of rent.

(d) The improvements erected by the lessee were unseverable and permanent improvements, the title to such improvements was at all times vested in the lessor immediately upon their attachment to the realty.

(e) The fair market value is not that found by the mathematical formula presented by respondent but instead the fair market value was not in excess of \$8,000.00.

(f) The six-year lease to which reference has heretofore been made was strictly a ground lease. The fair rental value for said lands covered by said lease as of 1946 did not exceed \$10 per month.

(g, h) The principal consideration for the lease was payment of taxes by the lessee. The building was built for the exclusive use of the lessee. Upon the termination of the six-year lease, January, 1952, a new lease was executed between the same parties, in which the lessee agreed to pay \$10 per month rent as well as all taxes and payment of insurance, thus negating the conclusion of the Commissioner that the consideration for the six-year lease was the

benefit the lessor would derive from ownership of the building.

(i) There was no provision in the lease that the building erected by the lessee was to be considered as liquidation in part or in whole of leased rental, nor were there any facts from which the Commissioner could rightfully conclude that it was the intention of the parties that the building erected by the lessee on the leased land was to be considered as in lieu of rent. The only rental requirement was payment of taxes and they were properly paid to cover all promises by lessee as rental consideration for the leased premises. The payment of taxes was adequate rent for use of the property rented and there is nothing further in the dealings between landlord and tenant in this case to indicate any intention to contract for any further payments, directly or indirectly, or in the form of property improvements.

(j) The error referred to in (j) speaks for itself.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and redetermine the deficiency alleged by the respondent Commissioner.

/s/ RAYMOND D. OGDEN,
Counsel for Petitioner.

Duly verified.

EXHIBIT A

U. S. Treasury Department
Office of Regional Commissioner
Internal Revenue Service
123 U. S. Court House
Seattle 4, Washington

Aug. 25, 1954.

In Replying Refer to:

Ap:S:AA:90D

JEQ:MHB

Mrs. Grace H. Cunningham,
2026 Louisa Street,
Seattle, Washington.

Dear Mrs. Cunningham:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency of \$6,725.59, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia,

in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant Regional Commissioner, Appellate, 123 United States Court House, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue;

By JAMES E. WESTIN,
Associate Chief,
Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form

Ap:S:AA:90D

JEQ:MHB

Statement

Mrs. Grace H. Cunningham
2026 Louisa Street
Seattle, Washington

Income Tax Liability for Taxable Year Ended
December 31, 1946

Year	Deficiency
1946	\$6,725.59

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated October 23, 1951; to your protest dated February 19, 1952; and to the statements made at the conferences held on April 9 and August 6, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. Raymond D. Ogden, Jr., 460 Olympic National Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1946
Adjustments to Net Income

Net income as disclosed by return, Form 1040	\$31,354.94
Unallowable deductions and additional income:	
(a) Rental income	14,714.60
Net income as adjusted	<u>\$46,069.54</u>

Explanation of Adjustments

(a) It is held that the cost of improvements placed in 1946 upon Lots 8, 9, 10, 11, and 12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, by American Manufacturing Company, Inc., lessee, said lots being then owned by you, constituted taxable income to you in 1946 as lessor, to the extent of the fair market value subject to the lease, of such improvements, which, pursuant to the lease instrument, was to revert to you at the end of the six year term. The agreement by the lessee to convey and transfer to you all of its right, title and interest in such improvements at the end of the lease period

constituted the principal consideration for said lease. Since there was no taxable income reflected in the return from this source your reported net income has consequently been increased by the amount of \$14,714.60, computed as follows:

Cost of improvements—1946	\$21,904.33
Less: Depreciation for six-year term of lease at 2½% per year	3,285.66
Depreciated or adjusted basis Jan. 2, 1952	\$18,618.67
Present value of \$1.00 payable at end of six years at 4% .....	.790314
Fair market value of improvements January 2, 1946	\$14,714.60

Computation of Alternative Tax

Net income as adjusted	\$46,069.54
Minus excess of net long-term capital gain over net short-term capital loss	29,422.33
Ordinary net income	\$16,647.21
Less exemptions	1,000.00
Normal tax and surtax net income	\$15,647.21
Tentative normal tax and surtax	5,034.19
Less 5 per cent of \$5,034.19	251.71
Partial tax	\$ 4,782.48
Plus 50 per cent of \$29,422.33	14,711.17
Total tax	\$19,493.65
Less income tax payments to a foreign country	11.25
Income tax liability	\$19,482.40
Liability disclosed by return, Orig. Acct. No. 3018272....	12,756.81
Deficiency in income tax	\$ 6,725.59

Received and filed October 22, 1954, T.C.U.S.

Served October 22, 1954.

[Title of Tax Court and Cause.]

Docket No. 55090

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4 (a) to (j), inclusive. Denies that the Commissioner erred in his determination of the deficiency as shown by the notice of deficiency from which the petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraphs 4 (a) to (j), inclusive, of the petition.

5 (a, b, c). Admits that there was a written lease executed covering lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Pierce County, Washington, running between Grace H. Cunningham, as lessor, and the American Manufacturing Company, as lessee. Admits that the period of the lease was six years. Denies the remaining allegations contained in paragraph 5 (a, b, c) of the petition.

(d) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5 (d) of the petition.

(e), (f), (g, h), (i) and (j). Denies the allegations contained in paragraphs 5 (e), (f), (g, h), (i) and (j) of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the respondent's determination of deficiency be in all respects approved.

/s/ DANIEL A. TAYLOR, W.H.P.
Chief Counsel, Internal
Revenue Service.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel;

JOHN H. WELCH,
Special Attorney, Internal
Revenue Service.

Filed November 22, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 55091

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:S:AA:90D-JEQ:MHB-JEQ:MH-Bloom:fb) dated August 25, 1954, and as a basis for his proceeding allege as follows:

1. The petitioners are husband and wife whose residence address is 2026 Louisa Street, Seattle, Washington. The return for the period here involved was filed with the District Director of Internal Revenue at Tacoma, Washington, formerly known as the Collector of Internal Revenue.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on August 25, 1954.

3. The taxes in controversy are alleged income for the calendar year of 1952 and in the amount of \$9,528.54.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in adding to net income of the petitioners for the taxable year ending December 31, 1952, the sum of \$18,071.06 as rental income which purported to represent the al-

leged fair market value of improvements erected by lessee on lessor's leased lands under the terms of a written lease.

(b) The Commissioner erred in holding that the improvements placed upon lessor's real property by lessee under terms of a written lease constituted either rental or taxable gain to the petitioners.

(c) The Commissioner erred in failing to find that the lease made no provision whatsoever for rental and that it was the agreement between the parties that there would be no rental other than payment of taxes.

(d) The Commissioner erred in failing to hold as a matter of law that the improvements erected by lessee became, by reason of being annexed to the freehold, the property of the taxpayers immediately upon completion of the improvements.

(e) The Commissioner erred in determining the fair market value of the improvements by using an arithmetical formula which gave no consideration to the many factors that go to make up fair market value.

(f) The Commissioner erred in failing to determine the amount of fair rental for the lands described in the lease for the period of the leasehold.

(g) The Commissioner erred in holding that the principal consideration for the lease was an agreement to transfer to petitioners all of lessee's improvements at the expiration of the lease.

(h) The Commissioner erred in not holding that the true consideration for the lease was the agreement on behalf of the lessee to pay taxes.

(i) The Commissioner erred in holding that there was a liquidation of lease rental in kind where under the terms of the lease no lease rental, other than taxes, was required.

(j) Under the facts in this case the Commissioner erred in assessing any deficiency on any ground whatsoever.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a, b, c) There was a written lease executed covering Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Pierce County, Washington, running between Grace H. Cunningham, as lessor, and the American Manufacturing Company, as lessee, in which lease there was no provision for rent other than the payment of taxes. The period of the lease was six years. The minutes of the American Manufacturing Company relating to said lease specifically recite that there was to be no rent charged other than payment of taxes, which taxes averaged approximately \$46 per month during the life of the lease. There was no statement in the lease nor in the minutes of the corporation, nor was it the intent of the parties that the building erected upon the leased premises by the lessee was in lieu of rent.

(d) The improvements erected by the lessee were unseverable and permanent improvements, the title to such improvements was at all times vested in the lessor immediately upon their attachment to the freehold.

(e) The fair market value is not that found by the mathematical formula presented by respondent but instead the fair market value was not in excess of \$8,000.00.

(f) The six-year lease to which reference has heretofore been made was strictly a ground lease. The fair rental value for said lands covered by said lease as of 1946 did not exceed \$10 per month.

(g, h) The principal consideration for the lease was payment of taxes by the lessee. The building was built for the exclusive use of the lessee. Upon the termination of the six-year lease, January, 1952, a new lease was executed between the same parties, in which the lessee agreed to pay \$10 per month rent as well as all taxes and payment of insurance, thus negating the conclusion of the Commissioner that the consideration for the six-year lease was the benefit the lessor would derive from ownership of the building.

(i) There was no provision in the lease that the building erected by the lessee was to be considered as liquidation in part or in whole of leased rental, nor were there any facts from which the Commissioner could rightfully conclude that it was the intention of the parties that the building erected by

the lessee on the leased land was to be considered as in lieu of rent. The only rental requirement was payment of taxes and they were properly paid to cover all promises by lessee as rental consideration for the leased premises. The payment of taxes was adequate rent for use of the property rented and there is nothing further in the dealings between landlord and tenant in this case to indicate any intention to contract for any further payments, directly or indirectly, or in the form of property improvements.

(j) The peaceful and unrestricted possession of the improvements erected upon the leased property, being Lots 8, 9, 10, 11 and 12 of Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, by the American Manufacturing Company, Inc., lessee, passed to the petitioners on the 2nd day of January, 1952, that being the date of termination of the said six-year lease. The value of said improvements was not included in gross income for 1952 and was then and now is specifically exempt from taxation, under the provisions of U.S.C.A. Title 26, Paragraph 22 (b)(11).

6. Wherefore the petitioners pray that this Board may hear the proceeding and redetermine the deficiency alleged by the respondent Commissioner.

/s/ RAYMOND D. OGDEN,
Counsel for Petitioners;

/s/ C. L. STONE,
Counsel for Petitioners.

Duly verified.

EXHIBIT A

U. S. Treasury Department
Office of the Regional Commissioner
Internal Revenue Service
123 U. S. Court House
Seattle 4, Washington

Aug. 25, 1954.

In Replying Refer to:

Ap:S:AA:90D
JEQ:MHB

Mr. Eugene F. Cunningham and
Mrs. Grace H. Cunningham,
Husband and Wife,
2026 Louisa Street,
Seattle, Washington.

Dear Mr. and Mrs. Cunningham:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1952, discloses a deficiency of \$9,528.54, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not

exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant Regional Commissioner, Appellate, 123 United States Court House, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue;

By JAMES E. WESTIN,
Associate Chief, Appellate
Division.

Enclosures:

Statement

Form 1276

Agreement Form

Ap:S:AA:90D
JEQ:MHB

Statement

Mr. Eugene F. Cunningham and Mrs. Grace H. Cunningham
Husband and Wife
2026 Louisa Street
Seattle, Washington

Income tax liability for taxable year ended
December 31, 1952

Year	Deficiency
1952	\$9,528.54

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 11, 1954; to your protest dated June 29, 1954; and to the statements made at the conference held on July 21, 1954.

A copy of this letter and statement has been mailed to your representative, Mr. Raymond D. Ogden, Jr., 460 Olympic National Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1946
Adjustments to Net Income

Net income disclosed by return, Form 1040	\$23,822.46
Unallowable deductions and additional income:	
(a) Rental income	18,071.06
	<hr/>
Net income as adjusted	\$41,893.52

Explanation of Adjustments

(a) It is held that the cost of improvements placed in 1946 upon Lots 8, 9, 10, 11, and 12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, by American Manufacturing Company, Inc., lessee, said lots being then owned by Grace H. Cunningham, constituted taxable income to you in 1952 as lessor, to the extent of the fair market value of such improvements, which, pursuant to the lease instrument, reverted to you at the end of the six year term. The agreement by the

lessee to convey and transfer to you all of its right, title and interest in such improvements at the end of the lease period constituted the principal consideration for said lease. Since there was no taxable income reflected in the return from this source your reported 1952 net income has consequently been increased by the amount of \$18,071.06, computed as follows:

Cost of improvements—1946	\$21,904.33
Less: Depreciation for six-year term of lease at 2½% per year	3,285.66
	<hr/>
Fair market value of improvements Jan. 2, 1952	\$18,618.67
Less: Depreciation for 1952 on above improvements	547.61
	<hr/>
Increase in income	\$18,071.06

Computation of Tax

Net income as adjusted	\$41,893.52
Less exemptions	1,800.00
	<hr/>
Balance	\$40,093.52
One-half of balance	20,046.76
Combined normal tax and surtax	8,144.99
Combined normal tax and surtax multiplied by two	16,289.98
Add self-employment tax	81.00
	<hr/>
Total tax liability	\$16,370.98
Liability disclosed by return, Orig. Acct. No. AF 712824	6,842.44
	<hr/>
Deficiency in income tax	\$ 9,528.54

Received and filed October 22, 1954, T.C.U.S.

Served October 22, 1954.

[Title of Tax Court and Cause.]

Docket No. 55091

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4 (a) to (j), inclusive. Denies that the Commissioner erred in his determination of the deficiency as shown by the notice of deficiency from which the petitioners' appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraphs 4 (a) to (j), inclusive, of the petition.

5 (a, b, c). Admits that there was a written lease executed covering Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Pierce County, Washington, running between Grace H. Cunningham, as lessor, and the American Manufacturing Company, as lessee. Admits that the period of the lease was six years. Denies the remaining allegations contained in paragraph 5 (a, b, c) of the petition.

(d) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5 (d) of the petition.

(e), (f), (g, h), (i) Denies the allegations contained in paragraphs 5 (e) ,(f) (g, h) and (i) of the petition.

(j) Admits that the peaceful and unrestricted possession of the improvements erected upon the leased property, being Lots 8, 9, 10, 11 and 12 of Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, by the American Manufacturing Company, Inc., lessee, passed to petitioners on the 2nd day of January, 1952, that being the date of termination of the said six-year lease. Admits that the value of said improvements was not included in gross income for 1952. Denies the remaining allegations contained in paragraph 5 (j) of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the respondent's determination of deficiency be in all respects approved.

/s/ DANIEL A. TAYLOR, W.H.P.
Chief Counsel, Internal
Revenue Service.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel;

JOHN H. WELCH,
Special Attorney, Internal
Revenue Service.

Filed November 22, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Docket Nos. 55090, 55091

Improvements by Lessee on Lessor's Property. Sections 22(a) and 22(b)(11), Internal Revenue Code of 1939—The owner of real estate leased the property to a corporation of which she was a principal pay stockholder, manager and financial backer. Under the lease the corporation was to make certain improvements upon the lots, pay the taxes on the property, and transfer title to the improvements to the lessor at the termination of the lease. The evidence establishes that the parties did not intend that the value of the improvements should constitute rent, but that the improvements were intended to benefit the business of the corporation. Held, that the petitioners did not realize taxable income as a result of such improvements either at the time of

construction thereof or upon termination of the lease.

RAYMOND D. OGDEN, ESQ.,

For the Petitioners.

JOHN H. WELCH, ESQ.,

For the Respondent.

Atkins, Judge:

The respondent determined deficiencies in income tax for the years 1946 and 1952 in the respective amounts of \$6,725.59 and \$9,528.54. The question presented for decision is whether any amount should be included in gross income of the petitioners in either 1946 or 1952, on account of improvements constructed in 1946 by a lessee under a six-year lease expiring in 1952, and, if so, the amount to be included.

Findings of Fact

Some of the facts are stipulated and are so found, the stipulation being incorporated herein by this reference.

The petitioners are husband and wife residing in Seattle, Washington. The petitioner, Grace H. Cunningham, filed her income tax return for the year 1946 with the collector of internal revenue at Tacoma, Washington. The two petitioners filed a joint income tax return for the year 1952 with the director of internal revenue at Tacoma, Washington. Here-

inafter the term "petitioner" refers to the petitioner, Grace H. Cunningham.¹

The petitioner in 1928 started a steel manufacturing enterprise which was incorporated in 1936 as the American Manufacturing Company, Inc. She has continuously been one of the principal owners of the stock and its general manager and financial backer. Her brother, T. M. Gepford, has been and now is president and executive head of the company. Her husband, the petitioner, Eugene F. Cunningham, has been vice president and a member of the board of directors. The company is in the business of manufacturing heavy machinery.

The property of the American Manufacturing Company is situated in block 2103 of the Tacoma Land Company's Fifth Addition in the City of Tacoma. Immediately to the east of such property, and separated therefrom by an alley 40 feet in width, are situated lots 7 to 12, inclusive, of block 2102, which in 1936 were owned by Martin A. and Mary E. Petrich. At that time those lots were not level, in some places being as much as 30 to 40 feet below grade, and had little usable surface. For many years they had constituted a dumping ground for rubbish and scrap. In 1936 American Manufacturing Company under an oral agreement with

¹In 1946 the petitioner, Grace H. Cunningham, held certain lots involved herein as her sole and separate property, but at some time prior to January 1, 1952, such lots, except one which had been sold, were converted to community property by proper instruments of conveyance.

the owners acquired the right to use those lots for open storage of steel and other materials and to make such fills thereon as might be necessary. By 1943 or 1944 the lots had been filled so as to become usable over their entire area. The American Manufacturing Company did not, up to that time, pay any rent or taxes thereon. For a portion of 1943 it paid \$10 per month for the use of lots 8 to 12 under an oral agreement after having installed an annealing oven on a portion of lots 8 to 12. The American Manufacturing Company agreed at that time to remove the annealing oven as soon as its use was terminated.

In 1943 the American Manufacturing Company erected a craneway on lot 9 of block 2102 to be used for the moving of heavy equipment. The dimensions of lot 9 are 25 feet by 120 feet. A slab of cement 25 feet in width and approximately 60 feet in length was laid down and the craneway was then erected of wood with columns running the full length of 120 feet.

The company was still in need of additional working space for steel cutting equipment. In October, 1944, the company owed a bank \$41,000. At January 1, 1946, it owed banks about \$172,000 and Cunningham Steel Foundry (owned by the petitioner, Eugene F. Cunningham) \$25,000. At the end of 1946 it owed banks about \$184,000. The petitioner was endorser and guarantor of the bank loans.

On October 26, 1944, the petitioner purchased lots 7 to 12 of block 2102 at a price of \$8,000. At that

time the American Manufacturing Company was expanding rapidly. Immediately following the purchase of the property by the petitioner, the American Manufacturing Company at its own cost placed an adequate roof over the superstructure of the craneway and also enclosed the entire south side of the craneway, 120 feet, with large windows supported by hollow cement tile blocks. This constituted the cheapest type of construction permitted by the building code of the City of Tacoma.

In November, 1945, the petitioner, Eugene F. Cunningham, desired to erect a warehouse building on lots 4, 5 and 6 of block 2102. The petitioner, Grace H. Cunningham, had no interest in such lots nor in the building to be constructed thereon. Petitioner Eugene F. Cunningham needed more area for the contemplated building and purchased lot 7 of block 2102 from the petitioner for \$1,333.33. He then erected a cement warehouse building 120 feet long and 100 feet wide, known as the Graybar Building, which was ready for occupancy by May, 1946. The southerly wall of the building constituted the dividing line between lots 7 and 8.

The petitioner, being the largest stockholder and manager of American Manufacturing Company, was desirous of permitting the company to expand its business and obtain the necessary room by changing the craneway into a complete structure. In the latter part of December, 1945, she entered into an oral lease with the American Manufacturing Company covering lots 8 to 12 of block 2102. It was agreed

that the American Manufacturing Company could use lot 8 which adjoined the Graybar Building and lot 9 for the purpose of enclosing both lots 8 and 9 as one large area 50 feet by 120 feet, this to be done by closing the two 50-foot ends by use of large doors and using the south wall of the Graybar Building as the north wall of the enclosure. The terms of this oral lease are substantially set forth in the minutes of a meeting of the board of directors of the American Manufacturing Company held on December 15, 1945. Such minutes contain the following:

* * * The President also announced that said Grace H. Cunningham was desirous of leasing said property to the American Manufacturing Company, Inc., on the following basis:

That the American Manufacturing Company would construct a building on said property at its own expense; would pay all the taxes, and at the end of a six-year period, said lease would be terminated and the building on the property would revert to the owner of the real property, Grace H. Cunningham. That there would be no rent paid for said lease but that the consideration for the lease was the transfer of the building to Grace H. Cunningham at the end of the term of the lease. Therefore, after full discussion having been had, the following resolution was unanimously adopted:

“Be It Resolved, that the proper officers of the American Manufacturing Company, Inc., be instructed to prepare the proper instruments to lease

from Grace H. Cunningham, Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, for a period of six years commencing with the 2nd day of January, 1946. That the terms and conditions of said lease be such that the consideration for said lease would be the transfer of any and all interests that the American Manufacturing Company, Inc., had in the building to be constructed on the premises to be transferred to Grace H. Cunningham. That American Manufacturing Company, Inc., would immediately commence construction of a building on said premises of the approximate value of \$25,000.00. That the proper officers of the American Manufacturing Company, Inc., also be instructed to pay the taxes on said property for the term of the lease.”

The lease was later reduced to writing in a written lease dated March 17, 1947. Such lease provides for a term of six years from January 2, 1946, to January 2, 1952. Therein it is recited:

* * * The consideration for said lease being that the lessee will pay taxes on the above-described property for a period of six years and will transfer, at the end of the period of the lease, all right, title and interest which said lessee has in a building which lessee has constructed and paid for on the above-described property.

* * *

And at the expiration of said term, the said lessee will quit and surrender the said premises

in good state and condition as they now are (ordinary wear and damage by the elements or fire excepted).

Prior to January 1, 1946, the American Manufacturing Company had expended \$2,800 for roofing of the craneway on lot 9 and the enclosure of the south wall with hollow tile and glass windows, and \$2,755 for grading and paving the alley. Subsequent to the effective date of the lease, January 2, 1946, the American Manufacturing Company expended \$11,097 as cost of improvements which, pursuant to the lease, were to revert to the petitioner at the end of the lease period. Another craneway was built located on lot 8, next to the Graybar Building, a floor was laid, a roof was constructed over lot 8 (resulting in a roof over both lots 8 and 9), and doors were installed at the ends of the structure located on both lots 8 and 9. The improvements placed upon the property by the American Manufacturing Company which under the terms of the lease were to revert to the petitioner are improvements attached to the realty.

On March 29, 1946, the petitioner, Eugene F. Cunningham, as first party and the petitioner, and the American Manufacturing Company, Inc., as second parties, entered into a party wall agreement. It was therein recited that the parties are the owners of adjoining pieces of property. Therein it was agreed that the south wall of the Graybar Building should be thereafter the common property of the parties to the agreement and that the covenants contained

in the agreement should run with the land. Since the Graybar Building was not as tall as the building on the petitioner's lots, it was necessary to extend the height of the wall by several feet. The party wall was completed in 1946 at some time prior to the execution of the party wall agreement on March 29, 1946. The American Manufacturing Company paid an amount of \$4,734 in connection with the party wall. The party wall agreement was made as a part of or in connection with the oral lease.

On January 2, 1952, the American Manufacturing Company released all right, title and interest in and to the improvements, to the petitioner. This release did not change or purport to change the rights of the parties under the party wall agreement.

On January 14, 1952, the petitioners, as husband and wife and as a community, executed a new lease with the American Manufacturing Company covering lots 8 and 9 and the east 40 feet of lot 10 in block 2102, together with improvements for a period of 10 years from and after January 1, 1952. The lessee agreed to pay \$10 per month and all taxes of every kind against the property and any and all other expenses of any kind or character incident to the occupation or maintenance of the premises. The lessee agreed that any additions or repairs or improvements placed upon the building should, at the expiration of the lease, become the property of the lessors. It further agreed to keep the building fully insured in an amount satisfactory to the lessors.

Since January 1, 1952, the American Manufacturing Company has paid rent of \$10 per month, together with taxes, for lots 8 and 9 and the east 40 feet of lot 10 of block 2102.

The only specified cash rent as such that was ever paid up to January 1, 1952, for the use of any part of the properties was \$10 per month for a portion of the year 1943, which was prior to the time the petitioner purchased lots 8 to 12.

The American Manufacturing Company capitalized the total cost of improvements on these lots at \$21,904.33 on its books and corporation income tax returns, and claimed a depreciation deduction of one-sixth of that amount in each of the taxable years 1946 to 1951, inclusive.

The assessed valuation of the lots, exclusive of improvements, as determined by the county assessor for the various years involved in the first lease period was \$2,800 and the average rate of taxation during such period was roughly 6.5 per cent. The average annual tax during such period, exclusive of improvements, was \$182. The taxes on lots 8 to 12, inclusive, including improvements, for the years 1946 to 1950, were as follows:

1946—paid in 1947.....	\$218.11
1947—paid in 1948.....	677.11
1948—paid in 1949.....	588.46
1949—paid in 1950.....	689.63
1950—paid in 1951.....	620.71

The annual cost of insurance was \$66.66. The policy does not protect the petitioner nor does she carry insurance on the property.

In determining the deficiency for the year 1946 the respondent added to reported taxable income the amount of \$14,714.60 as rental income, stating that "the cost of improvements placed in 1946 upon Lots 8, 9, 10, 11 and 12 * * * constituted taxable income to you in 1946 as lessor, to the extent of the fair market value subject to the lease, of such improvements, which, pursuant to the lease instrument, was to revert to you at the end of the six-year term." His computation of the amount of \$14,714.60 was as follows:

Cost of improvements—1946	\$21,904.33
Less: Depreciation for six-year term of lease at 2½% per year	3,285.66
	<hr/>
Depreciated or adjusted basis Jan. 2, 1952	\$18,618.67
Present value of \$1.00 payable at end of six years at 4% . . . . .	.790314
	<hr/>
Fair market value of improvements January 2, 1946	\$14,714.60

In determining the deficiency for the year 1952 the respondent added to reported taxable income the amount of \$18,071.06 as rental income, stating that "the cost of improvements * * * constituted taxable income to you in 1952 as lessor, to the extent of the

fair market value of such improvements, which, pursuant to the lease instrument, reverted to you at the end of the six-year term." The amount of \$18,071.06 was computed by the respondent as follows:

Cost of improvements—1946.....	\$21,904.33
Less: Depreciation for six-year term of lease at 2½% per year.....	3,285.66
	<hr/>
Fair market value of improvements Jan. 2, 1952.....	\$18,618.67
Less: Depreciation for 1952 on above improvements	547.61
	<hr/>
Increase in income.....	\$18,071.06

Included in the above cost of \$21,904.33 is the amount of \$4,734 paid by the American Manufacturing Company to constitute the south wall of the Graybar Building, a party wall. Also included is the amount of \$2,755, the cost of construction and hard-surfacing of the alley. This \$2,755 does not constitute a proper part of the cost of the building.

The parties to the lease did not intend that the value of the improvements made by the lessee should, and it did not, represent, in whole or in part, rent at the time of construction or at the termination of the lease.

Opinion

The question presented for decision is whether income was derived either by the petitioner, Grace H. Cunningham in 1946 when the lessee, American

Manufacturing Company, made improvements on her property, or by her and her husband, the petitioner, Eugene F. Cunningham, on account thereof in 1952 at the termination of the lease, at which time the property was held as community property. There is not before us for decision any question as to whether taxable income was derived by the petitioners as a result of other requirements of the lease such as the payment by the lessee of taxes on the property.

The respondent concedes that in determining deficiencies for both 1946 and 1952 he has acted inconsistently and that income was derived in only one year, contending primarily that the proper year was 1946, but in the alternative that income was derived in 1952.

The petitioners contend that under the circumstances here presented no income was derived in either year. Alternatively, they contend that income could have been derived only in 1952 and that the amount of income has been erroneously computed.

We are concerned with sections 22(a) and 22(b) (11) of the Internal Revenue Code of 1939. Section 22(a) provides:

General Definition—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of

any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 22(b)(11) provides:

Exclusions from Gross Income—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * *

Improvements by lessee on lessor's property—Income, other than rent, derived by a lessor of real property upon the termination of a lease, representing the value of such property attributable to buildings erected or other improvements made by the lessee.

The question of whether and when a lessor derives taxable income as a result of improvements made by a lessee has, through the years, been a troublesome one and has been the subject of much litigation and also of legislation. A brief discussion of the historical background is helpful.

In *M. E. Blatt Co. v. U. S.*, 305 U.S. 267 (1938), the owner of real estate leased the property in 1930

for use as a moving picture theater for a term of 10 years, beginning upon completion of improvements to be made. The lessor agreed to make certain alterations and the lessee agreed to install the latest type of moving picture apparatus and other furniture and equipment necessary for the successful operation of a modern theater, to become the property of the lessor at the expiration, or sooner termination, of the lease. The lessee agreed to pay for certain of the improvements. The Commissioner added to the taxpayer's income for the first year of the lease one-tenth of the estimated depreciated value at the termination of the lease of the alterations and improvements paid for by the lessee. The Supreme Court held that no income was derived in such year either as rental or otherwise, stating in part:

There is nothing in the findings to suggest that cost of any improvement made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. While the lease required it to make improvements necessary for successful operation, no item was specified, nor the time or amount of any expenditure. The requirement was one making for success of the business to be done on the leased premises. It well may have been deemed by lessor essential or appropriate to secure payment of the rent stipulated in the lease. Even when required, improvements by lessee will not be deemed rent unless intention that they shall be is plainly disclosed. Rent is "a fixed sum, or property amount-

ing to a fixed sum, to be paid at stated times for the use of property * * *; it does not include payments, uncertain both as to amount and time, made for the cost of improvements * * *." The facts found are clearly not sufficient to sustain the lower court's holding to the effect that the making of improvements by lessee was payment of rent.

It remains to be considered whether the amount in question represented taxable income, other than rent, in the first year of the term.

* * *

Granting that the improvements increased the value of the building, that enhancement is not realized income of lessor. So far as concerns taxable income, the value of the improvements is not distinguishable from excess, if any there may be, of value over cost of improvements made by lessor. Each was an addition to capital; not income within the meaning of the statute. Treasury Regulations can add nothing to income as defined by Congress.

But, assuming that at some time value of the improvements would be income of lessor, it cannot be reasonably assigned to the year in which they were installed. The commissioner found that at the end of the term some would be worthless and excluded them. He also excluded depreciation of other items. These exclusions imply that elements which will not outlast lessee's right to use are not at any time income of lessor. The inclusion of the remaining value is to hold that petitioner's right to have them as a part of the building at expiration of lease consti-

tutes income in the first year of the term in an amount equal to their estimated value at the end of the term without any deduction to obtain present worth as of date of installation. It may be assumed that, subject to the lease, lessor became owner of the improvements at the time they were made. But it had no right to use or dispose of them during the term. Mere acquisition of that sort did not amount to contemporaneous realization of gain within the meaning of the statute.

In *Helvering v. Bruun*, 309 U.S. 461 (1940), the taxpayer as owner had in 1915 leased land and a building thereon for a term of 99 years. The lessee had the right under certain conditions to remove buildings, provided that no building should be removed or torn down after the lease became forfeited or during the last three and one-half years of the term. The lessee was to surrender the land, upon termination of the lease, with all buildings and improvements thereon. In 1929 the lessee removed the existing building and constructed a new one. In 1933 the lease was cancelled for default and the lessor regained possession of the land and building. The Commissioner determined that in 1933 the taxpayer realized a net gain in the amount of the net fair market value of the new building. In that case the Supreme Court upheld that determination, stating in part:

The course of administrative practice and judicial decision in respect of the question presented has not been uniform. In 1917 the Treasury ruled that the

adjusted value of improvements installed upon leased premises is income to the lessor upon the termination of the lease. The ruling was incorporated in two succeeding editions of the Treasury Regulations. In 1919 the Circuit Court of Appeals for the Ninth Circuit held in *Miller v. Gearin*, 258 F. 225, that the regulation was invalid as the gain, if taxable at all, must be taxed as of the year when the improvements were completed.

The regulations were accordingly amended to impose a tax upon the gain in the year of completion of the improvements, measured by their anticipated value at the termination of the lease and discounted for the duration of the lease. Subsequently the regulations permitted the lessor to spread the depreciated value of the improvements over the remaining life of the lease, reporting an aliquot part each year, with provision that, upon premature termination, a tax should be imposed upon the excess of the then value of the improvements over the amount theretofore returned.

In 1935 the Circuit Court of Appeals for the Second Circuit decided in *Hewitt Realty Co. v. Commissioner*, 76 F. 2d 880 * * * that a landlord received no taxable income in a year, during the term of the lease, in which his tenant erected a building on the leased land. The court, while recognizing that the lessor need not receive money to be taxable, based its decision that no taxable gain was realized in that case on the fact that the improvement was not portable or detachable from the

land, and if removed would be worthless except as bricks, iron, and mortar. * * *

This decision invalidated the regulations then in force.

* * *

The circumstance of the instant case differentiate it from the Blatt and Hewitt cases; but the petitioner's [Commissioner's] contention that gain was realized when the respondent [the taxpayer], through forfeiture of the lease, obtained untrammelled title, possession and control of the premises, with the added increment of value added by the new building, runs counter to the decision in the Miller case and to the reasoning in the Hewitt case.

* * *

We hold that the petitioner was right in assessing the gain as realized in 1933.

* * *

The respondent cannot successfully contend that the definition of gross income in Sec. 22(a) of the Revenue Act of 1932 is not broad enough to embrace the gain in question. That definition follows closely the Sixteenth Amendment. * * *

* * *

Here, as a result of a business transaction, the respondent received back his land with a new building on it, which added an ascertainable amount to its value. It is not necessary to recognition of taxable gain that he should be able to sever the improvement begetting the gain from his original capital. * * *

After the Supreme Court's decision in the Bruun case there remained no question that the value of improvements made by a lessee constituted taxable income to the lessor, under the broad definition of income contained in section 22(a), at the date of termination of the lease. *Lewis v. Pope Estate Co.* (C.A. 9, 1940), 116 F. 2d 328, cert. denied, 314 U.S. 630; *Greenwood Packing Plant v. Commissioner* (C.A. 4, 1942), 131 F. 2d 787; and *Trask v. Hoey* (C.A. 2, 1949), 177 F. 2d 940.²

Thereafter, however, Congress, by section 101 of the Revenue Act of 1942, enacted section 22(b)(11), quoted hereinabove, to modify the effect of the Bruun case by limiting the recognition of income on termination of the lease to that which constituted rent.³

²Treasury Decision 4980, 1940-2 C.B. 42, was promulgated on July 2, 1940, amending section 19.22 (a)-13 of Regulations 103 to read in part as follows:

Improvements by lessee—If buildings are erected or other improvements are made by a lessee, the lessor shall include in gross income as of the date he acquires possession or control of the real estate with such improvements thereon, at the termination of the lease by forfeiture or otherwise, an amount equal to the excess of the value as of such date of the real estate with such improvements thereon over the value as of such date of the real estate without such improvements.

³The Ways and Means Committee Report (H. Rept. No. 2333, 77th Cong., 2nd Sess.) and the Finance Committee Report (S. Rept. No. 1631, 77th Cong., 2nd Sess.), state as follows, 1942-2 C.B. 425:

In *Helvering v. Bruun* (309 U.S. 461 (1940) * * *) it was held that buildings or other improvements

The Revenue Act of 1942 also added subsection (c) to section 113 of the Internal Revenue Code to provide that the basis of real property should not be increased or diminished on account of income derived by a lessor and excludible from gross income under section 22(b)(11).

Section 29.22(b)(11)-1 of Regulations 111, promulgated under section 22(b)(11) of the 1939 Code, as amended, provides in part:

Sec. 29.22(b)(11)-1. Exclusion from Gross Income of Lessor of Real Property of Value of Improvements Erected by Lessee—Income derived by a lessor of real property upon the termination, through forfeiture or otherwise, of the lease of such property and attributable to buildings erected or other improvements made by the lessee upon the leased property is excluded from gross income. However, where the

made by a lessee constitute income to a lessor to the extent of the value of such improvements at the time the lease is forfeited and the lessor secures control and possession of the property. Your committee believes it advisable to exclude (except in cases in which such improvements represent a liquidation in kind of lease rentals) from the gross income of the lessor income attributable to such improvements. Such exclusion from gross income of the lessor does not mean that the enhancement in value in the hands of the lessor will not be ultimately taxed. By reason of the fact that the gross income attributable to the value of the improvements is not recognized, the basis of the property in the hands of the lessor will not be increased by such item.

facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals, the exclusion from gross income shall not apply to the extent that such buildings or improvements represent such liquidation. The exclusion applies only with respect to the income realized by the lessor upon the termination of the lease and has no application to income, if any, in the form of rent, which may be derived by a lessor during the period of the lease and attributable to buildings erected or other improvements made by the lessee. * * *

Such regulations, including an example set forth therein, clearly indicate that neither at the termination of a lease nor at any time during the period of the lease does a lessor derive taxable income as a result of improvements upon leased premises, unless the income attributable to them constitutes rental income. On the other hand regulations do in effect provide that taxable income may be derived by a lessor on account of improvements by the lessee during the period of the lease if any such income represents rental. It is apparently upon the basis of this regulation that the respondent makes his principal contention that the petitioner in the instant case derived income in 1946 from the construction of the improvements. The petitioner argues strongly that under the authorities set forth hereinabove a lessor may not be considered as deriving income prior to termination of the lease, whether as rent or otherwise.

In the view we take of the instant case, we find it unnecessary to decide that question. It is clear that neither the statute nor the regulations purport to treat as taxable income to the lessor at any time the value of improvements unless such value represents rent.

In *M. E. Blatt Co. v. U. S.*, *supra*, the Supreme Court has clearly stated that whether the value of such improvements constitutes rent depends upon the intention of the parties, and that even when the improvements are required by the terms of the lease this value will not be deemed rent unless the intention that it shall be such is plainly disclosed. Such intent in our opinion is to be derived not only from the terms of the lease but from the surrounding circumstances. This is recognized by the respondent in his published ruling I.T. 4009, 1950-1 C.B. 13.

In the instant case, while the lease, both in its oral and written form, provides that the consideration for the lease was to be in part the transfer, at the end of the term of the lease, of the building to the petitioner, we note that the contemporaneous construction of the lease by the directors, as shown in their minutes is that there would be no rent paid for the lease. Consistently, the company, as lessee, did not treat the cost of the improvements as rental, but treated such cost on its books and in its income tax returns as a capital outlay and amortized it over the term of the lease.

The petitioner, Grace H. Cunningham, in 1928 started the steel manufacturing enterprise which

was incorporated in 1936 as the American Manufacturing Company, Inc. She was one of the principal stockholders, and its manager and financial backer, and had endorsed and guaranteed its bank loans, amounting at one time to about \$184,000. Her brother was president and her husband, Eugene F. Cunningham, was vice president. At the time the petitioner purchased the land and entered into the lease the company was in dire need of room for expansion. It had previously used the lots for outdoor storage without paying rental to the prior owners, except a nominal rental for a portion of the year 1943. After the petitioner acquired the property and before the oral lease was entered into, the company placed a roof over the craneway and enclosed one side thereof. After the date of the lease it continued to make other improvements to this structure as described in the findings of fact.

The petitioner testified that the reason she bought the lots and leased them to the company was in order that her company would have working space in that locality and not be forced to move, and that she had no intention of charging rent. She stated that the company was to use the lots for nothing, provided it payed the taxes. She also testified that she considered the improvements to be of a special type of construction to meet the particular need of the business of the company, that they did not have any value to anyone else except some one in a similar manufacturing business and that there was no other company in the city doing similar manufacturing. She stated that as the property

owner she did not consider that the improvements had any value and that if she had not been connected with the company she would have required an agreement on the part of the lessee to remove the improvements. The petitioner, Eugene F. Cunningham, testified that in 1945 the company was not in a financial position to buy the lots. When the lease terminated in 1952 and title to the improvements was acquired by the petitioners, they entered into a new written lease with the company covering substantially the same properties for a period of 10 years at an agreed rental of \$10 per month, the lessee to pay all taxes and maintenance and any new improvements to become the property of the lessors at the end of the term.

We are satisfied from this testimony and from the acts of the parties to the lease that they did not intend that the value of the improvements should constitute rent either at the time of construction or at the termination of the lease. We have therefore concluded and found as a fact that the value of such improvements made by the lessee did not represent rent at the time of construction or upon termination of the lease. It follows that the petitioners did not derive income attributable to such improvements either in 1946 or in 1952.

Decision will be entered for the petitioners.

Served June 17, 1957.

Entered June 17, 1957.

Filed June 17, 1957.

Tax Court of the United States
Washington

Docket No. 55090

GRACE H. CUNNINGHAM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed June 17, 1957, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1946.

/s/ CRAIG S. ATKINS,
Judge.

Served June 26, 1957.

Entered June 26, 1957.

Tax Court of the United States
Washington

Docket No. 55091

EUGENE F. CUNNINGHAM and GRACE H.
CUNNINGHAM, Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed June 17, 1957, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1952.

/s/ CRAIG S. ATKINS,
Judge.

Served June 26, 1957.

Entered June 26, 1957.

[Title of Tax Court and Cause.]

Docket Nos. 55090 and 55091

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-

entitled taxpayers, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated.

1. Petitioners, Eugene F. Cunningham and Grace H. Cunningham, are husband and wife, residing at 2026 Louisa Street, Seattle, Washington. The above-captioned proceedings may be consolidated for the purposes of trial and opinion, as similar issues are involved in each proceeding. The deficiency letter in Docket No. 55090 states as follows:

“Explanation of Adjustments:

“(a) It is held that the cost of improvements placed in 1946 upon Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, by American Manufacturing Company, Inc., lessee, said lots being then owned by you, constituted taxable income to you in 1946 as lessor, to the extent of the fair market value subject to the lease, of such improvements, which, pursuant to the lease instrument, was to revert to you at the end of the six-year term.”

The deficiency letter in Docket No. 55091 states as follows:

“Explanation of Adjustments:

“(a) It is held that the cost of improvements placed in 1946 upon Lots 8, 9, 10, 11 and

12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, by American Manufacturing Company, Inc., lessee, said lots being then owned by Grace H. Cunningham, constituted taxable income to you in 1952 as lessor, to the extent of the fair market value of such improvements, which, pursuant to the lease instrument, reverted to you at the end of the six year term.”

The same property and improvements are involved in each proceeding and the determinations are inconsistent. The matter is left for the Court to decide whether the cost of improvements constitutes taxable income, and if so, whether such cost, if at all, becomes income for 1946 or 1952. In view of the situation hereinabove set forth the facts herein stipulated apply with equal force to both cases.

2. The deficiency letter in each proceeding was mailed on August 25, 1954, and petitioners were advised of respondent's determination of deficiencies in income tax, the entire amounts of which are in controversy. The deficiencies so involved are as follows:

Docket No.	Taxable Year	Amount
55090	1946	\$6,725.59
55091	1952	\$9,528.54

3. Petitioner, Grace H. Cunningham, has been one of the principal owners of the stock of the American Manufacturing Company, a Washington corporation, since the date of its incorporation in

1936, and has continuously been an official and active in the management thereof. Her brother, T. M. Gepford, has been and now is president and executive head of the company. The company at all times has been engaged in the manufacture of heavy machinery.

4. In, 1936 and for some years prior thereto, Martin A. Petrich and Mary E. Petrich, husband and wife, and Leo J. Hunt and Louise G. Hunt, husband and wife, were the owners of Lots 7 to 12, inclusive, of Block 2102, Map of New Tacoma, Washington Territory. The property of the American Manufacturing Company was situated in Block 2103 which lies immediately to the west of said Lots 7 to 12 and separated therefrom by an alley 40 feet in width. Said Lots 7 to 12 are each 25 feet wide and 120 feet long.

5. In 1936 pursuant to an oral agreement between the American Manufacturing Company and the owners of said lots, the American Manufacturing Company acquired the right to use so much of said lots as were susceptible of use for open storage of steel and other like materials used by the American Manufacturing Company in the operation of its business and with the right to make such fills on the lots as the American Manufacturing Company found necessary or useful in their occupation and use of the lots.

6. The American Manufacturing Company was to pay no rent and no taxes; this condition con-

tinued until 1943 at which time the American Manufacturing Company desired to build an annealing oven on a portion of said lots. Thereupon a second oral agreement was entered into with the owners of the lots to the effect that the American Manufacturing Company could install an annealing oven on the property but would be required to pay a rental of \$10.00 a month, and to further agree to remove the annealing oven as soon as its use was terminated.

7. In the year 1943 the American Manufacturing Company was also desirous of erecting a crane-way on lot 9. This the company did by laying down a cement slab 25 feet in width and approximately 60 feet in length. Lot 9 is 25 feet by 120 feet. The craneway was a wooden structure with supporting columns running the full length of the 120 feet. The pillars were of sufficient strength to bear the superstructure of the craneway. The craneway was to be used for the moving of heavy equipment.

8. On October 26, 1944, petitioner Grace H. Cunningham purchased lots 7 to 12, inclusive, of said block 2102 at a price of \$8,000.00. At that time the American Manufacturing Company was expanding rapidly. Immediately following the purchase of the property by Petitioner Grace H. Cunningham, the American Manufacturing Company at its own cost placed an adequate roof over the superstructure of the craneway, and also enclosed the entire south side of said craneway by the use of large windows, 17 feet by 18 feet, supported by hollow cement tile blocks. The windows were placed between the sup-

porting wooden columns thus enclosing the entire south side, a distance of 120 feet, thus protecting the workmen from inclement weather, the prevailing winds and storms coming from the south.

9. In November of 1945 Petitioner Eugene F. Cunningham, husband of the taxpayer, desired to erect a warehouse building on Lots 4, 5 and 6 of said Block 2102. Petitioner Grace H. Cunningham had no interest in said lots, nor in the building to be constructed thereon. Petitioner Eugene F. Cunningham needed more area for the contemplated building and to that end did purchase from taxpayer Lot 7 in said Block 2102 for the price of \$1,333.33, being $\frac{1}{5}$ of \$8,000.00 original purchase price. Eugene F. Cunningham then proceeded with the erection of the cement warehouse building, had the same ready for occupancy by May of 1946. This building was known as the Graybar Building. The Graybar Building was 120 feet long and 100 feet wide. The southerly wall of the building constituted the dividing line between Lots 7 and 8. The length of the wall being 120 feet running from A Street on the east to the alley on the west.

10. In the latter part of December, 1945, American Manufacturing Company entered into an oral lease with the taxpayer covering lots 8 to 12, inclusive, of said Block 2102, the terms of which lease provided that the American Manufacturing Company could use Lot 8, which adjoined the Graybar Building, and Lot 9, for the purpose of enclosing

both Lots 8 and 9 as one large area 50 feet by 120 feet. This to be done by closing the two 50-foot ends by use of large doors and using the south wall of the Graybar Building as the north wall of the 50 feet by 120 feet enclosure.

11. The minutes of a meeting of the Board of Directors of the American Manufacturing Company held on the 15th day of December, 1945, substantially set forth the terms of the oral lease which was later reduced to writing in a written lease dated March 17, 1947, running between Grace H. Cunningham and the American Manufacturing Company. A copy of the lease and the minutes are attached hereto, identified as Exhibits 1-A and 2-B, respectively, and incorporated herein by this reference.

12. Grace H. Cunningham, being the largest stockholder and manager of said American Manufacturing Company, was desirous of permitting the company to expand its business and obtain the then necessary room by changing the craneway into a complete structure.

13. The taxes on Lots 8 to 12, inclusive, including improvements, for the years 1946 to 1950, inclusive, are as follows:

1946—paid in 1947.....	\$218.11
1947—paid in 1948.....	677.11
1948—paid in 1949.....	588.46

1949—paid in 1950.....	689.63
1950—paid in 1951.....	620.71

The annual cost of insurance was \$66.66; Maintenance, nonsegregable.

14. Each of the deficiency notices in the above proceedings state that the cost of improvements for the year 1946, which was the building in question, was \$21,904.33. Included in this amount is \$4,734.00, which is the amount of money paid for the joint use of the southerly wall of the Graybar Building as a party wall. Attached hereto, identified as Exhibit 3-C and incorporated herein by this reference is a copy of a Party-Wall Agreement dated March 29, 1946. This document was properly acknowledged and is filed of record with the County auditor of Pierce County as of April 22, 1946, Vol. 817 of deeds, Pages 705 and 706, file number 1407577.

15. There is also included in the figure of \$21,904.33 an item of \$2,755.00, the cost of the construction and hard surfacing of a public alley, the alley being the 40-foot alley connecting South 22nd and South 23rd Streets, and is situated between said Block 2103, occupied by the American Manufacturing Company, and said Block 2102. This alley was filled and brought up to grade and blacktopped by the American Manufacturing Company and the Graybar Building owners jointly. The American Manufacturing Company's share of the cost was \$2,755.00. This alley has never been vacated and is open to the use of the public and is continuously

used by the public, and constitutes one of the alleys in the street system of the City of Tacoma.

16. This \$2,755.00 does not constitute any proper part of the cost of the said building, consequently the \$2,755.00 cost of the alley should be deducted from the sum of \$21,904.33. The question of whether or not the cost of the party wall under the circumstances of this case should also be deducted from the \$21,904.33 is a matter which must be left to the determination of the Court.

17. In the construction of the walls erected by the American Manufacturing Company in the transforming of the craneway into an enclosed building hollow cement tile and large windows were used. This constituted the cheapest type of construction permitted by the Building Code of the City of Tacoma.

18. On January 2, 1952, the American Manufacturing Company released all right, title and interest in and to said improvements to Grace H. Cunningham, taxpayer herein. This release did not change or purport to change the rights of the parties under the party-wall agreement heretofore referred to.

19. On the 2nd day of January, 1952, the petitioners, as husband and wife and as a community, executed a new lease to the American Manufacturing Company covering Lots 8 and 9 and the East 40 feet of Lot 10 in said Block 2102, together with improvements. A copy of this lease is attached

hereto, identified as Exhibit 4-D, and incorporated herein by this reference.

20. Said lots 7 to 12, inclusive, which were originally owned by said Petrich and Hunt, constituted in the main a deep hole or depression and had little usable surface which was up to grade. This hole or depression, which in some places was approximately 30 to 40 feet below grade, had for many many years constituted a dumping ground for rubbish and scrap of various kinds.

21. In accordance with an oral agreement American Manufacturing Company was given permission to utilize so much of said lots as were usable and to fill in as much of said lots as the American Manufacturing Company chose to do. Under this arrangement the lots were, by 1943 or 1944, filled so as to become usable over their entire area; during this period of time the American Manufacturing Company never paid a dollar of rent nor did it pay any taxes to the original owners.

22. The only specified cash rent as such that has ever been paid, up to January 1, 1952, for the use of any part of these properties was \$10.00 a month for a portion of the year 1943, which was prior to Grace H. Cunningham's purchase. This covered Lots 8 to 12, inclusive. Since January 1, 1952, the American Manufacturing Company has paid rent of \$10.00 per month, together with taxes, for Lots 8 and 9 and the East 40 feet of Lot 10 of said Block 2102.

23. The following is a statement of the money expended by the American Manufacturing Company prior to January 1, 1946, the date of the lease:

Roofing the craneway and the enclosure of the south wall thereof with hollow tile and glass windows.....	\$ 2,800.00
Cost of grading and paving the alley	2,755.00

24. The cost of the party wall was 4,734.00

25. The American Manufacturing Company spent 11,097.00 subsequent to the date of the lease of January 1, 1946, as cost of improvements which pursuant to the lease were to revert to the petitioner, Grace H. Cunningham at the end of the lease period.

26. The assessed valuation, exclusive of improvements, as determined by the County assessor for the various years involved in the lease period was \$2,800.00, and the average rate of taxation during said period was roughly 6.5%. The average annual tax during said period, exclusive of improvements, was \$182.00.

27. The following are the sales of the American Manufacturing Company for the years 1946 to 1955, inclusive:

1946	\$ 436,615.84
1947	678,094.07
1948	676,358.91

1949	.....	\$ 420,875.01
1950	.....	726,439.21
1951	.....	990,667.06
1952	.....	920,255.60
1953	.....	1,171,648.13
1954	.....	974,929.02
1955	.....	1,456,533.06

28. That the improvements placed upon the property by the American Manufacturing Company, which under the terms of the lease are to revert to the taxpayer at the end of the lease period, are improvements attached to the realty.

29. The American Manufacturing Company capitalized the total cost of \$21,904.33 on its books and corporation income tax returns and claimed depreciation for one-sixth of that amount as a deduction for income tax purposes during each of the taxable years 1946 to 1951, inclusive.

30. The parties to these proceedings, Eugene F. Cunningham and Grace H. Cunningham, were at all times herein mentioned and now are husband and wife. That during 1946 Lots 8 to 12, inclusive, of said Block 2102, were owned by Grace H. Cunningham as her sole and separate property. Thereafter and prior to January 1, 1952, the above-described property, together with improvements, had by proper instruments of conveyance become the community property of Grace H. Cunningham and Eugene F. Cunningham, her husband. In Docket

No. 55090 the Respondent has determined that the cost of the improvements to the aforesaid real estate made by the lessee subsequent to January 1, 1946, which by the terms of the lease would revert to Grace H. Cunningham at the end of the six-year period, constituted taxable income to Grace H. Cunningham in 1946. In Docket No. 55091 the Respondent has further determined that the cost of the said above-referred-to improvements became taxable income to Eugene F. Cunningham and Grace H. Cunningham in 1952.

/s/ RAYMOND D. OGDEN,

Counsel for Petitioner in Docket No. 55090 and
Counsel for Petitioners in Docket No. 55091;

/s/ C. L. STONE,

Counsel for Petitioner in Docket No. 55090 and
Counsel for Petitioners in Docket No. 55091.

/s/ JOHN POTTS BARNES, WHP

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

EXHIBIT 1-A

Lease

This Indenture, made this 17th day of March, 1947, between Grace H. Cunningham and American Manufacturing Company, Inc., hereinafter designated as the lessor and the lessee,

Witnesseth:

That the said lessor does by these presents lease and demise unto the said lessee the following described real estate and premises, situate in the City of Tacoma, in the County of Pierce and State of Washington, to wit:

Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma
Land Company, Fifth Addition

with the appurtenances, for the term of six years from the 2nd day of January, 1946, to the 2nd day of January, 1952. The consideration for said lease being that the lessee will pay taxes on the above-described property for a period of six years and will transfer, at the end of the period of the lease, all right, title and interest which said lessee has in a building which lessee has constructed and paid for on the above-described property.

And It Is Hereby Agreed that if default shall be made in any of the covenants herein contained, then it shall be lawful for said lessor to re-enter the said premises and remove all persons therefrom, and the said lessee does hereby covenant, promise and agree to carry out the conditions of this lease in the manner hereinbefore specified, and not to let or underlet the whole or any part of said premises, nor assign this lease nor any interest therein without the written consent of said lessor.

And at the expiration of said term, the said lessee will quit and surrender the said premises in

good state and condition as they now are (ordinary wear and damage by the elements or fire excepted).

In Witness Whereof, the said parties have hereunto set their hands and seals the day and year first written.

/s/ GRACE H. CUNNINGHAM,
American Manufacturing
Company, Inc.

By /s/ T. M. GEPFORD,
President.

State of Washington,
County of Pierce—ss.

I, H. E. McLean, Notary Public, in and for the State of Washington, residing at Tacoma, do hereby certify that on this 17th day of March, 1947, personally appeared before me Grace H. Cunningham, to me known to be the individual in and who executed the within instrument and acknowledged that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes herein mentioned.

Given Under My Hand and Official Seal this 17th day of March, 1947.

[Seal] /s/ H. E. McLEAN,
Notary Public in and for the State of Washington,
Residing at Tacoma.

State of Washington,
County of Pierce—ss.

On this 17th day of March, 1947, before me personally appeared T. M. Gepford to me known to be the President of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and official seal the day and year first above written.

[Seal] /s/ H. E. McLEAN,
Notary Public in and for the State of Washington,
Residing at Tacoma.

EXHIBIT 2-B

Minutes of Special Meeting of Board of Directors
of American Manufacturing Company, Inc.

A special meeting of the Board of Directors of the American Manufacturing Company, Inc., having been called by the President for the 15th day of December, 1945, at the hour of 10 a.m. o'clock at the office of the Corporation at 2119 Pacific Avenue, Tacoma, Washington, and all members of the

Board having signed a Waiver of Notice of time, place and purpose of the meeting, the following business was transacted:

The President announced that, due to the rapidly expanding business of the American Manufacturing Company, Inc., it was necessary to have more building space. That Grace H. Cunningham owned certain real property, namely, Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Pierce County, Washington. That said property was situated strategically and would make an ideal building site for said American Manufacturing Company, Inc. The President also announced that said Grace H. Cunningham was desirous of leasing said property to the American Manufacturing Company, Inc., on the following basis:

That the American Manufacturing Company would construct a building on said property at its own expense; would pay all the taxes, and at the end of a six-year period, said lease would be terminated and the building on the property would revert to the owner of the real property, Grace H. Cunningham. That there would be no rent paid for said lease but that the consideration for the lease was the transfer of the building to Grace H. Cunningham at the end of the term of the lease. Therefore, after full discussion having been had, the following resolution was unanimously adopted:

“Be It Resolved, that the proper officers of the American Manufacturing Company, Inc.,

be instructed to prepare the proper instruments to lease from Grace H. Cunningham, Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma Land Company, Fifth Addition, Tacoma, Washington, for a period of six years commencing with the 2nd day of January, 1946. That the terms and conditions of said lease be such that the consideration for said lease would be the transfer of any and all interests that the American Manufacturing Company, Inc., had in the building to be constructed on the premises to be transferred to Grace H. Cunningham. That American Manufacturing Company, Inc., would immediately commence construction of a building on said premises of the approximate value of \$25,000.00. That the proper officers of the American Manufacturing Company, Inc., also be instructed to pay the taxes on said property for the term of the lease.”

The Secretary was instructed to note in the minutes that inasmuch as Grace H. Cunningham was a party involved in this transaction, she did not vote on the above resolution.

There being no further business to come before the meeting, the meeting was adjourned.

/s/ JACK M. MOE,
Secretary.

Attest:

/s/ T. M. GEPFORD,
President.

(Copy.)

EXHIBIT 3-C

1407577

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Party-Wall Agreement

This Indenture Made this 29th day of March, 1946, by and between Eugene F. Cunningham, hereinafter referred to as First Party, and Grace H. Cunningham and The American Manufacturing Company, Inc., hereinafter referred to as Second Parties,

Witnesseth:

Whereas, the parties hereto are the owners of adjoining pieces of property in Tacoma, Pierce County, Washington,

And Whereas, it is the mutual desire of said parties to make and enter into an agreement to designate a certain wall, dividing their said properties, as a Party Wall.

Now This Indenture Witnesseth, that in consideration of this agreement and of the covenants hereinafter contained, each of the said parties hereby covenants with each of the others, his heirs and assigns in the manner following:

(1) It is mutually agreed between First Party and Second Parties that the South wall of the Graybar Building, which said building is situated on the following described property:

Lots 7, 6, 5, and 4, Block 2102, Tacoma Land Company's Fifth Addition, Tacoma, Pierce County, Washington,

and which said wall is constructed of:

12-in. concrete block wall, 8x12x16-in. blocks, 14 ft. 9 in. high, supported by a 8-in. x 1-ft. 8-in. footing and 12 in. concrete wall 2 ft. high,

shall be from this date hence forward and shall so remain until changed by stipulation of the parties hereto, their heirs, executors, or assigns, a Party Wall, and shall be and become and remain the common property of the parties hereto.

(2) It is further agreed between the First Party and Second Parties hereto that the Party Wall herein described shall be,

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become, and remain a Party Wall with the lines and boundaries as they are now established, and in no other manner.

(3) It is agreed between First Party and Second Parties hereto that this agreement shall include the wall herein described or a replacement thereof, on the lines and boundaries as now established, and that the covenants herein contained shall run with the land, and that the rights, duties, and obligations resting upon the Parties hereto by virtue of the covenants herein contained, shall continue until such time as said parties otherwise agree.

In Witness Whereof, we have placed our hands and seals this 29th day of March, 1946.

/s/ EUGENE F. CUNNINGHAM,

/s/ GRACE H. CUNNINGHAM,

/s/ T. M. GEPFORD,

President, American Mfg. Co.

State of Washington,
County of Pierce—ss.

I, the undersigned, a Notary Public in and for the State of Washington, hereby certify that on this 29th day of March, 1946, personally appeared before me Eugene F. Cunningham and Grace H. Cunningham, to me known to be the individuals described in and who executed the foregoing instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given Under My Hand and Official Seal the day and year last above written.

[Seal] /s/ M. McELROY,

Notary Public in and for the State of Washington,
Residing at Tacoma.

(Copy.)

EXHIBIT 4-D

Lease

This Indenture, made and entered into this 14th day of January, 1952, by and between Grace H. Cunningham and Eugene Cunningham, Lessors and American Manufacturing Company, Inc., a corporation, organized and existing under and by virtue of the Laws of the State of Washington, as Lessee,

Witnesseth:

That the Lessors do, by these presents, lease and demise unto the Lessee the following described real estate, situated in the City of Tacoma, County of Pierce, State of Washington, more particularly described as follows:

Lots 8 and 9, and the East 40' of Lot 10,
Block 2102 Tacoma Land Company Fifth Addition to the City of Tacoma,

together with appurtenances thereunto belonging, for a term of ten (10) years from and after the 1 day of January, 1952.

The Lessee agrees to pay as rental the sum of Ten (\$10.00) Dollars per month, payable in advance on the first day of each and every month for the term of this lease, and in addition thereto, agrees to pay all taxes of every kind and nature charged against said property, together with any and all other expenses of any kind or character incident to the occupation or maintenance of said premises.

Lessee agrees to keep said premises in as good state of repair as the same now is, natural wear and tear excepted, and upon the expiration of this lease to deliver said premises to the Lessors in as good condition as the same now is, natural wear and tear excepted.

Any additions or repairs or improvements placed upon said building shall, at the expiration of this lease become the property of the Lessors, and shall not by the Lessee be removed from said building upon the expiration of said lease.

Lessee further agrees to keep said building fully insured in an amount entirely satisfactory to said Lessors, and to deliver a copy of said policy of insurance to the Lessors.

In Witness Whereof, the parties hereto have set their hands and seals the 14th day of January, 1952.

/s/ GRACE H. CUNNINGHAM,

/s/ EUGENE F. CUNNINGHAM,

Lessors.

[Seal]

AMERICAN MANUFACTUR-
ING COMPANY, INC.,

By /s/ T. M. GEPFORD,

President;

By /s/ JACK M. MOE,

Secretary,

Lessee.

State of Washington,
County of Pierce—ss.

I, H. E. McLean, a Notary Public in and for the State of Washington, residing at Tacoma, in the above-named County and State, duly commissioned, sworn and qualified, do hereby certify that on this 14th day of January, A.D., 1952, before me personally appeared Grace H. Cunningham and Eugene Cunningham, to me known to be the individuals described in, and who executed the within instrument as their free and voluntary acts and deeds, for the uses and purposes therein mentioned.

Given Under My Hand and Official Seal This 14th Day of January, 1952.

[Seal] /s/ H. E. McLEAN,
Notary Public in and for the State of Washington,
Residing at Tacoma.

State of Washington,
County of Pierce—ss.

On this 14th day of January, A.D., 1952, before me personally appeared T. M. Gepford and Jack M. Moe, to me known to be the President and Secretary, respectively, of the corporation that executed the within instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument

and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ H. E. McLEAN,

Notary Public in and for the State of Washington, Residing at Tacoma.

Filed at hearing May 17, 1956.

The Tax Court of the United States

Docket No. 55090

GRACE H. CUNNINGHAM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 55091

EUGENE F. CUNNINGHAM and GRACE H. CUNNINGHAM,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Thursday, May 17, 1956

The hearing in the above-entitled matter was convened at 9:30 o'clock a.m., before

The Honorable Craig S. Atkins, Presiding.

Appearances:

RAYMOND D. OGDEN, ESQ.,
On Behalf of the Petitioner.

JOHN H. WELCH, ESQ.,
On Behalf of the Respondent.

PROCEEDINGS

The Court: Are you ready to proceed, gentlemen?

The Clerk: Docket 55090 and 55091, Grace H. Cunningham and Eugene F. Cunningham. Will counsel state their appearances?

Mr. Welch: John H. Welch, appearing for the respondent, your Honor.

Mr. Ogden: Raymond D. Ogden, appearing for the petitioner.

The Court: Do you care to make an opening statement, Mr. Ogden?

Mr. Ogden: Yes.

If it please the Court, I take it the necessity for an opening statement is because of the reason that we have stipulated most of the facts. There are certain facts which we couldn't agree on in the stipulation, and the evidence will be directed toward those matters. But it did seem to me that before we got into it that something ought to be said. It would be a funny-sounding thing to the Court sitting up there and not know what it is all about.

The case, we have two cases which are combined together and they involve identically the same state of facts. The matter arose in this wise: The pe-

titioner, the taxpayer, Mrs. Cunningham, owned certain lots over in the City of Tacoma, five in number, and on those lots certain improvements [3*] were placed and those improvements were at first under an oral lease and then a year and two months later a written lease was entered into. And the provision of the lease was that there was to be no rent but the building improvements, whatever they were, would at the end of the six-year period revert to the owner. The agent elected to hold that those improvements were made in lieu of rent and, therefore, were subject to be listed as gross income subject to tax.

The Court: In which year?

Mr. Ogden: In 1946, which was the year that the improvements were put in.

The Court: Rather than the end of the lease year?

Mr. Ogden: Yes. Now, the second case, after this got down to the Commission, he issued his 90-day letter saying that this should be considered as gross income in 1946, the year that the improvement was made, then along later he comes through with a second matter, second letter in which he holds, well, they started all over again and held that it was income at the end of the lease when the reversion took place. So we have one case that is income at the time the improvements were placed upon the property, and one that was income when it reverted.

The Court: And both involved the same property?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Ogden: Absolutely the same identical thing. The facts now that are somewhat in controversy, not [4] in controversy but the department didn't want to feel that they wanted to stipulate them, is the matter to which I first direct your Honor's attention. The American Manufacturing Company is a corporation over in Tacoma and they are engaged in the manufacture of heavy equipment, heavy steel equipment, machinery. That business was started in 1928 by Mrs. Cunningham, the taxpayer, sitting here at the table. Later in 1936 it was incorporated under the name of the American Manufacturing Company. Mrs. Cunningham is the owner and controls the capital stock of that corporation, and has been its manager ever since it started, spending her time six days a week now since 1928 in the business. Not only has she been its manager, but she has also been its financier, all obligations of the corporation have been endorsed and guaranteed by her to the banks, running into \$175,000, \$200,000.

Her husband at the time in 1946 when their nine properties were divided, she had her separate property and he had his separate property. Therefore, the first tax matter is charged to her as an individual in '46 because then she was the owner individually. Prior to 1952, the termination of the six-year lease, they again combined their separate properties back into community property so that the second 90-day letter was addressed to Grace Cunningham and Eugene Cunningham, her husband.

The Court: May I interrupt to ask one thing.

How do [5] you go about combining your separate properties to make it community property?

Mr. Ogden: In the State of Washington——

The Court (Interrupting): Yes?

Mr. Ogden (Continuing): ——that can be done by deed and written declaration and a transfer. You can take them out of community property with a declaration, and the deed is made accordingly so that they are separate property. If the presumption of this day is after marriage that all property acquired thereafter is community property and again separate property, if commingled after marriage can by virtue of such commingling become community property. Does that answer your question?

The Court: Yes. Thank you.

Mr. Ogden: In 1946 the American Manufacturing Company was in need of more space. They have a plant and right across the alley, a 40-foot alley lay these vacant lots. These vacant lots as stated in the stipulation were of such physical character that they were of little use and had been of little use for many, many years, in fact they were used for a dumping ground by the American Manufacturing Company and its predecessor used those lots for outdoor storage without paying any rent, taxes or otherwise, to the owners. In 1945 the American Manufacturing Company through an agreement with the owners arranged to place upon Lot 9 a craneway and I will hand to the Court a [6] photograph and I will ask to have that later admitted in evidence. That is a photograph of the craneway.

These lots are 25 feet wide and 120 feet long. This craneway that you see runs the full length of the 120 feet. In 1945 this was erected by the American Manufacturing Company on the property, the property at that time belonging to the original owners, their names are set forth in the stipulation. When this craneway was going to be built on the property, the original owners said if you are going to put the craneway on it you are going to have to pay some rent because it is going to increase the taxes, and when you get through you have to take it off.

In 1946 the American Manufacturing Company needed still more space and the evidence will show that they had no money with which to buy this property, being at that time indebted to the extent of around \$140,000 to Cunningham Steel Company. Mrs. Cunningham bought these lots and she bought them for \$8,000, there were then six lots, one of them was sold to the people who built the Graybar Building which lies just to the north. So you had, then, this property with a craneway on it when Mrs. Cunningham bought it. She then, after they bought it in October of 1946—now I say she because she now is still manager, owner and the financier of the American Manufacturing Company. She then had them, or the American Manufacturing Company did then roof over this craneway, put a roof on it and along the wall that you see facing you, which [7] was the south wall they enclosed the whole length of the south wall with cement tile and large windows, 17 by 18 steel windows that we use in manufacturing plants. That was enclosed on the south side.

Under the stipulation the cost of that whole matter was estimated to be \$2,500 to \$2,800.

At the end of 1945 American Manufacturing Company still needed more room, so it was then determined that they would enter into a lease agreement with Mrs. Cunningham whereby they would proceed, now, with the craneway that you see boxed in by a wall on the south, from which our storms come, so it was open space to work in. They then proceeded to build a roof over Lot 8 which lies just directly north of the picture you are seeing. That also is 25 feet wide and 120 feet long. Beyond that lay the Graybar Building, a one-story building which was built by Mr. Cunningham, private property, and Mrs. Cunningham had no connection or no investment in the Graybar Building, but the Graybar Building constituted the north wall of this improvement that they were going to put in. In other words, they were going to bridge from the present craneway you see over to the wall of the Graybar Building, put a roof on it and they would then have a piece of ground 120 feet long by 50 feet wide, being the two lots. They were then to close in the ends of those lots and thus make an area with cement floors of 50 feet wide and approximately 120 feet long. That was the improvement which was put in by the American Manufacturing Company [9] after January 1, 1946, at the date of the oral lease. In the stipulation it is provided that the cost of that improvement, namely roofing over, closing in the ends, laying the cement floor, was around \$11,094. That was the extent of the money invested by

the American Manufacturing Company after the first of January, 1946, which under the terms of the lease would revert to Mrs. Cunningham January 1, 1952. And in the Commissioner's 90-day letter he said that that improvement put in by the American Manufacturing Company after January 1, 1946, constituted—which would revert to her at the end of the period, constituted rent. Now, that is one of the things that we couldn't agree on, that statement I just made. The evidence will support that statement.

The second question that we have to devote some attention to in the evidence is whether or not at the time of the making of this oral lease which a year and two months later was reduced to writing, what was the intent of the parties. Now, I have no quarrel at all with the department for not wanting to put in the stipulation that the intent of the parties was so and so, and that was to be a matter of evidence. The evidence will show that it was the intent of American Manufacturing Company and of the taxpayer that there should be no rent. It is a peculiar situation, if your Honor please, because Grace Cunningham, manager, largest stockholder and controller of the American Manufacturing Company, the president of which was her brother who deals with herself as a taxpayer relative to these lots that she bought for the use and benefit of American Manufacturing Company, and that is your situation exactly.

Now, the third matter is the question of what

rent—for the sake of argument, granted for the sake of argument that it could be held that this improvement was a liquidation of rent and, therefore, getting around the statute which was passed in 1942, still, it is only a liquidation of such rental as is appropriate to the property involved. Therefore, I want to prove, we want to prove what was the fair rental value of those five vacant lots in 1946. That rental value, whatever that rental value may be is the total amount, according to the theory of the taxpayer that could be allocated to gross income over the period.

The next point, the Commissioner in determining the market value of the improvement, took a figure of \$21,000 and in that \$21,000 he then in 1946 deducted depreciation of two and a half per cent, or a four year life, and then computed what the value of that sum so derived multiplied by four per cent which gave him a factor of 78 or something, which gave him what he said was a fair market value of the improvement. Now, we want to prove, and will prove, and the stipulation couldn't be entered into with respect thereto as to what was the true market value of this improvement which was put upon the property subsequent to January 1, 1946. That, then, is a [10] question that involves the amount of the rent.

Now comes the third and last, and that is what depreciation, if any, should be permitted in the type of improvement that was made. To clear the atmosphere just a little more, but this is in the stipulation, I don't want—there won't be any evidence

introduced in regard thereto, but to make the statement intelligibly, the tax agent took from the books of the American Manufacturing Company an item of \$21,000 and some odd dollars which was on their books fixed as the cost to American Manufacturing Company of the improvement placed upon these lots. The stipulation shows that in that 21,000 dollars was the grading and paving of a 40-foot alley which lay between the main plant of the American Manufacturing Company and these lots. That ran over \$3,000, some odd figure. Then that, of course, is an open alley in the City of Tacoma and the stipulation says that should be deducted from the \$21,000 because that is no part of the improvement.

The second question is when the Graybar Building was built, that a party-wall agreement was entered into in writing in March of '46 in which Eugene Cunningham sold to the American Manufacturing Company and to Grace Cunningham a one-half interest in that wall for the sum of \$4,000 and some odd dollars. It is in the stipulation. Now, we couldn't agree that the stipulation should say that that cost of the party wall should be deducted from the \$21,000 because it was no part of the [11] improvement and in the stipulation it is recited that the determination of where that shall be allocated shall be left up to the Tax Court. The position of the taxpayer, of course, being that the party-wall agreement speaks for itself, they say it is an agreement running with the land and it is in

the form and shape of the properly executed and properly filed agreement.

The third item that is in this \$21,000, the first being now the party wall, the second being the alley, the third item is the cost of these improvements in the photograph which you see which were put on the property prior to the making of the lease so that the stipulation provides that the cost of the improvements that was put on the property subsequent to January 1 is \$11,000 and some odd dollars which is not, of course, the \$21,000 that was used by the agent when he first fixed the price.

I think that covers the matter.

The Court: Very well. Mr. Welch, do you have a statement?

Mr. Welch: Yes, your Honor.

If the Court please, I think your Honor realizes that the respondent has taken two positions in this proceeding. At the present time I don't regard either position as an alternative, they are both Primary positions, and of course we don't expect to prevail upon both because the same transaction is involved. We expect that the value of the improvement placed [12] on this land will constitute income either in 1946 or in 1952.

The Court: In that connection will you take a position on a brief as to one or the other or perhaps you don't know at this time?

Mr. Welch: I expect to do this, your Honor, on brief argue one of the years as a primary position and then the other as an alternative, but at the

present time I am not prepared to state which is the primary one.

The Court: If the year 1952 is the year in which it might be taxable, I presume the value would perhaps be less than at the time of construction or not? Is that what Mr. Ogden was talking about, about the depreciation on it?

Mr. Welch: The way it is set forth in the deficiency letters, the deficiency for 1952 is larger because the respondent there has simply taken the cost and applied what he determined to be a proper rate of depreciation to arrive at the 1952 value, but he has further reduced the 1952 value by a factor in order to arrive at what would be the value of the future right in six years, it was in 1946 so actually it would have to be a smaller amount than 1946 because of that factor. We agree in the stipulation that these cases may be consolidated, your Honor, and we expect to offer the stipulation right at the conclusion of my statement and the stipulation of facts covers, of course, the majority of the facts that the Court will be expected to consider in arriving at his decision. The [13] lease and the corporate minutes are identified in the stipulation and the terms thereof are set forth in their entirety. From our standpoint, no further explanation of the provisions of those documents is necessary. Petitioner expects to offer some further evidence in that respect, but from our standpoint we feel the documents cover the situation adequately. The Court will have to decide the question of the party wall in this proceeding. We have agreed on the cost, the

American Manufacturing Company's share of the cost of the party wall. We have stipulated as to the agreement itself and the question, of course, arises as to whether that is actually part of this real estate and, therefore, a part of the reversion which occurred in 1952. Setting forth in our deficiency letters the amount of income to be included, we have used a depreciation rate of two and a half per cent on a factory building which is about average in accordance with Bulletin "F" and other publications that have appeared with respect to proper rates of depreciation. And respondent has relied on the cost as shown by the taxpayer's records, however, there are some adjustments in the stipulation because we later discovered that part of that cost was attributable to the improvement of an alley which was not on the land. It was a public alley and therefore didn't enter the controversy here. The reason, I don't think Mr. Ogden covered it, that there are two petitioners in the second docket that is involved here, is that in 1946 [14] a separate income tax return was filed by Mrs. Cunningham, in 1952 a joint return was filed by Mr. and Mrs. Cunningham, and that, of course, explains, in addition explains the reason why Mr. Cunningham is a party to this proceeding.

In connection with the problem of rental, from respondent's standpoint the fair rental of vacant land in Tacoma really isn't a problem. Mr. Ogden indicated that he expected to establish what was the fair rental of this property, but again from our

standpoint we feel that it is immaterial to this proceeding.

The Court: In other words, you feel that in this case you have evidence of what it was worth, you have evidence about the improvement that was made and to revert to the owner, is that true?

Mr. Welch: That is right.

The Court: I see.

Mr. Welch: I have no further statement at this time, your Honor, except that I would jointly with Mr. Ogden offer the stipulation of facts and indicate to the Court that there are four exhibits attached, that is, 1-A through 4-D. They are identified in the stipulation and physically attached. I would like to offer them as a part of the stipulation.

The Court: The stipulation will be received in evidence.

(Respondent's Exhibits 1-A, 2-B, 3-C and 4-D were marked for identification and received in evidence.) [15]

Mr. Welch: Could I move at this time, your Honor, that these cases be consolidated for the purposes of the hearing?

Mr. Ogden: That is agreeable with us.

The Court: They will be consolidated for hearing.

I have no questions at this time. Do you care to go ahead at this time with your proof, Mr. Ogden?

EUGENE F. CUNNINGHAM

was called as a witness by and on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address, Mr. Witness?

The Witness: Eugene F. Cunningham, 2026 Louisa Street, Seattle 2, Washington.

Direct Examination

By Mr. Ogden:

Q. Mr. Cunningham, you are the husband of Grace Cunningham? A. That is right.

Q. And you are the Eugene Cunningham who together with Mrs. Cunningham made the joint return in 1952? A. Yes, sir.

Q. In 1946, what was your connection, if anything, with American Manufacturing Company?

A. I think I was vice-president of the company at that [16] time and had not been actively interested in it at that moment, up until that time.

Q. Were you on the board of directors at that time? A. That is right, I believe so.

Q. Were you present at the time in 1946—no, in 1945 when a meeting was held of the board of directors of the American Manufacturnig Company in which the matter of leasing lots 8 to 12, inclusive, was taken up? A. I believe I was.

Q. Do you know what use, if any, the American Manufacturing Company had made of these lots prior to 1946? A. Yes, I do.

(Testimony of Eugene F. Cunningham.)

Q. State to the Court what that was.

A. They had erected a temporary craneway, more or less temporary craneway on the building, they had also previously erected an annealing oven which I believe was torn down very shortly after these additional improvements were put up. The purpose of it was for war work that they had been doing for Webster Pringle Company.

Q. Prior to the time the annealing oven was put on there had the American Manufacturing Company been using those lots?

A. Yes, they had, for a number of years for storage and various other purposes.

Q. Had any rent been paid to the owners?

A. Not to my knowledge up until the time they put the [17] craneway on.

Q. At the time the craneway was put on the property by the American Manufacturing Company, was there a rent paid then?

A. Yes, the sum of \$10.00 a month.

Q. Ten dollars a month? A. Yes.

Q. To the original owners?

A. Yes, a Mr. Petrich, I believe it is.

Q. The reason I am not going into that more in detail, the original owners are set forth fully in the stipulation.

In what line of business was the American Manufacturing Company engaged in?

A. They were engaged in the manufacture of sawmill and plywood items, machinery, during the war they were manufacturing components for ships

(Testimony of Eugene F. Cunningham.)

for the Webster Pringle Company and for various other concerns.

Q. State to the Court whether or not there was any need or intention on the part of American Manufacturing Company for additional space?

A. Yes, they were very pressed for space, they had expanded to the extent of the craneway and an annealing oven out there, and they were still in dire need of improvements in the alley and for handling the material in and out, as well as additional working space, and they needed steel cutting equipment, etc., a place to put it. [18]

Q. Do you know whether or not the American Manufacturing Company in 1946 was in a financial position to buy lots 8 to 12, inclusive?

A. No, they were not.

Mr. Welch: Objection, your Honor.

The Court: What is the objection?

Mr. Ogden: The reason for asking the question is to show that at the time the necessity for expansion occurred that the reason the American Manufacturing Company did not buy these lots was because they were not in a financial position to buy them, that Mrs. Cunningham bought them for the use and benefit of the American Manufacturing Company and for no other purpose whatsoever.

The Court: Your objection, Mr. Welch?

Mr. Welch: My objection, your Honor, is that the financial condition of American Manufacturing Company is not a relevant matter in this proceeding. It is stipulated that Mrs. Cunningham bought

(Testimony of Eugene F. Cunningham.)

the lots and I don't feel that this Court should inquire into whether or not someone else might have bought the lots under the circumstances. I don't think it is material to the controversy.

Mr. Ogden: The other reason, if your Honor please, is that the cases involving this question of whether or not buildings placed upon leased property by the lessee and reverting after a period of time to the lessor when, how and where [19] shall it, if ever, be called gross income subjecto to tax. This question perplexed the courts of this nation for over forty years, even before the question of legal rights, even before the income tax came in in 1914, and after that the Supreme Court has held and the Circuit Court of Appeals many times have held that to determine whether or not it was the intent of the parties that this improvement placed upon the leased premises was to be considered as rent or at least a portion of it as rent, or part of it was rent, was to be determined one, from the instruments, two, from the expression of the parties as to their intent at the time, and the third, the facts surrounding the transaction, all of which were to be considered by the court in determining whether or not it ever was the intent of the parties that the structure should have been at least in part, if not wholly for rent. Now, that is the reason I am asking to have this evidence introduced to show that it was the intent, what the intent of the parties was at the time the property was purchased, then

(Testimony of Eugene F. Cunningham.)

follow it with what they did with the property, much of which is in the stipulation.

The Court: This was a written lease, was it?

Mr. Ogden: The lease was an oral lease to start with in 1946, was not reduced to writing until March of 1947.

The Court: We do have a copy of that in the stipulation?

Mr. Ogden: That is right. And you have a copy in [20] there of the minutes of the American Manufacturing Company in December of 1945 where the officers, proper officers, were directed to enter into these negotiations.

The Court: Well, the Court is disposed to allow the evidence in for whatever it may be worth. Now, I am not admitting anything to vary the terms of this lease, it may be to some extent an explanation of the written lease, but I will allow it in for whatever it may be worth.

I overrule the objection, Mr. Welch.

Q. (By Mr. Ogden): Will you answer the question?

(Question read.)

A. I don't think they were, they owed the Cunningham Steel Foundry, which was my organization in Seattle, some \$25,000 and a substantial bank loan in addition. I don't feel that they were in a position to then buy them.

Q. Do you know whether or not there was ever any intent upon the part of the American Manu-

(Testimony of Eugene F. Cunningham.)

facturing Company at the time this agreement was entered into relative to the improvements that were put on subsequent to January 1, 1946, as to whether those improvements were or were not to be considered in part or in whole as rent?

A. No, they weren't.

The Court: Let the Court interrupt. You speak of the intent of a corporation—— [21]

Mr. Ogden (Interrupting): He was vice-president and director and was at the meeting.

The Court: There was a meeting?

Mr. Ogden: Yes, and the minutes are attached to the stipulation.

The Court: I would like to see the minutes.

Mr. Ogden: They are attached to the stipulation.

Mr. Welch: It is Exhibit 2-B, your Honor.

The Court: Mr. Ogden, the reason I interrupted at this point is for the purpose of saying this, that it is going to be up to the Court to determine whether this was rent or not and we have here the minutes and I presume here we have also the terms of the lease itself.

Mr. Ogden: The lease that was made a year and two months later.

The Court: I think we are going to be governed pretty much by the terms of these instruments.

Mr. Ogden: That is true.

The Court: Now, the minutes state that there would be no rent paid for said lease but that the consideration for the lease was the transfer of the

(Testimony of Eugene F. Cunningham.)

building to Grace H. Cunningham at the end of the term of the lease.

Mr. Ogden: That is right.

The Court: Well, that comes down to a legal question when it says there will be no rent and in the next breath says [22] the consideration for the lease will be the building.

Mr. Ogden: And the payment of taxes.

The Court: It seems to me that maybe you are asking the witness to answer the question that we are called upon to decide, upon the basis of all the evidence here.

Mr. Ogden: I think, if your Honor please, that the question of what is meant by the term consideration is a question of law that will have to be thrashed out.

The Court: I think so.

Mr. Ogden: Of course the Commissioner of Internal Revenue has to define rent and he defined it very fully and completely in an "I.T." in which he says—that will be set forth in our briefs and I don't know if we want to argue that question now—he says rents are specifically a charge made in definite amount of money and paid for a piece of property and must be definite amount and definite substance, and in the Black case they said the same thing. Now, the use of the term "consideration" in there, you will find that in hundreds of leases calls a ground rental where buildings are placed upon the property in truth and in fact the placing of the building upon the property is one of the considera-

(Testimony of Eugene F. Cunningham.)

tions for the entering into of one of those ground leases. The ground rental the lessee gets, the lessor gets, is taxes he gets paid, and if as of the day of reversion he gets the building, that also, all of that is a consideration for the entering into and the use of the [23] term consideration is one that will be set forth fully in the decisions on it in our briefs.

The Court: Very well. I will allow the witness to go ahead on this line, but I just wanted to warn you that I think he is getting very close to stating the conclusion on what the Court itself is going to have to decide and it may not be worth too much in the determination of the case. On the other hand it may be, I am not prejudging that matter of it.

Mr. Ogden: I understand.

(Last question read.)

A. They were not considered as rent.

Mr. Welch: I think that question can be answered yes or no.

Q. (By Mr. Ogden): Can you make a yes or no answer? A. All right, no.

The Court: The other answer will be stricken and this last answer will stand.

The Witness: It is rather a complicated question and I am not too sure that I understand it.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

The last question will be stricken. [24]

(Testimony of Eugene F. Cunningham.)

Q. (By Mr. Ogden): Was there at the time of the entering into of this contract in the last week in December of '45 authorizing the lease to be made between American Manufacturing Company and Grace Cunningham covering the lots in question, was there any discussion as to whether or not the improvement that was to be placed upon the property was or was not rent?

A. There was no discussion.

Q. Will you state to the Court the disposition the American Manufacturing Company made of the cost of the improvements on their books, how was it entered on their books.

A. It was capitalized and depreciated.

Mr. Welch: I will have to object, your Honor. I think that has been stipulated to and of course that would be the first basis of my objection, and of course the books would be the best evidence of that.

Mr. Ogden: It is provided in the stipulation that the amount of money was capitalized.

The Court: Strike the answer and the question, then, if it is already stipulated.

Mr. Ogden: Yes.

The Court: Very well.

Q. (By Mr. Ogden): Mr. Cunningham, will you explain to the Court what was the nature and extent of the improvements placed upon Lot 9 [25] being one of the five lots by American Manufacturing after January 1, 1946?

A. Are we speaking of the lot next to the Graybar Company, Lot 9?

(Testimony of Eugene F. Cunningham.)

Q. Eight is the one next to Graybar and nine is the one on which the craneway was built first.

A. There was practically no improvements made to 9 which was the existing craneway, lot 8 was improved, the one next to the Graybar Building.

Q. By what, what did they physically do to it?

A. They put a roof over the top of it, they put ends in the improvement that had been on there as well as the improvement that they were then putting on, a roof and floors and the two ends for enclosures.

Q. Those ends that were enclosed——

A. (Interrupting): ——There was also a crane-way, if I may amplify it, a craneway was added to this additional 25 foot lot.

Q. So you had a craneway then on lot 8 which was adjoining the Graybar Building?

A. Right.

Q. And a craneway on lot 9 which had been put in prior to January 1, 1946?

A. Of very similar character, that is right.

Q. The ends of the structure now enclosed, what was the [26] improvements there, was that walls or doors?

A. They were large doors, large doors on each lot about 25-foot doors, I believe there were two doors opening in opposite directions on each one of the lots, on each end of the building, the whole end of the building opened in other words. They were merely doors with a column between.

Q. With respect to the party wall—strike that. If your Honor please, that is in the stipulation.

(Testimony of Eugene F. Cunningham.)

Mr. Cunningham, what was, if you know, the market value of the improvements placed on this property, these lots subsequent to January 1, 1946, by the American Manufacturing Company?

Mr. Welch: I object, your Honor.

Q. (By Mr. Ogden): What was the fair market value of these improvements?

The Court: At what time?

Q. (By Mr. Ogden): Subsequent to January 1, 1946, when they were made.

The Court: When they were completed?

Mr. Ogden: When they were completed, they were completed sometime in the first three or four months of '46.

The Court: Now, there is an objection.

Mr. Welch: He has asked for an opinion now, your Honor, from this witness, and I see no foundation whatever that has been set forth of this witness being qualified in any respect [27] to give an opinion as to the fair market value of the property.

Mr. Ogden: I will strike the question and qualify him.

The Court: Very well.

Q. (By Mr. Ogden): Mr. Cunningham, what is your business? A. Well——

Q. (Interrupting): ——Are you an engineer?

A. Yes, sir, and I have had a great deal of experience in the liquidation of machinery and equipment, buildings, etc., over the years.

Q. At one time you were engaged as a specialist

(Testimony of Eugene F. Cunningham.)

in that business, were you not? A. Right.

Q. For a number of years?

A. Yes, sir. Particularly in the used machinery business.

Q. From your experience not only as an engineer but your experience gained through conducting a private business which had to do with machinery and liquidation of plants, did you acquire knowledge or experience which would qualify you in forming a judgment as to what was the fair market value of these improvements placed on these lots by the American Manufacturing Company after January 1, 1946?

A. I feel that I have.

Q. What, then, in your opinion was the fair market value [28] of these improvements when they were completed by the American Manufacturing Company after January 1, 1946?

A. I would say that it would be at most a few hundred dollars, something less than five hundred dollars more than the cost of removing them, if they had any value.

Q. Why do you reach that conclusion?

A. After all there was nothing to salvage except lumber and heavy timbers which had already been sawed to various shapes and they had little, if any, value at that time after they were taken down. You would have to sell it at a very nominal price and labor was expensive.

Q. What was the normal life of the improvements placed upon this property by the American

(Testimony of Eugene F. Cunningham.)

Manufacturing Company after January 1, 1946?

A. I think that is a very hard question to answer. Probably, I think, obsolescence is the thing that will eventually write them off. I think that the period of the lease determined the value to the American Manufacturing Company or the length of life to the American Manufacturing Company.

Q. State to the Court whether or not the American Manufacturing Company depreciated the cost of these improvements over the period of the lease? A. They did.

Q. Were their tax returns based on such depreciation? A. That is right. [29]

Mr. Welch: I think that is covered in the stipulation of facts and I object.

Mr. Ogden: I think that is all. You may inquire.

Cross-Examination

By Mr. Welch:

Q. Mr. Cunningham, you have stated that you were a director of the American Manufacturing Company? A. That is right.

Q. And when did you take such office, if you recall?

A. I can't remember at the present time. It was quite a number of years ago, even prior to that. I was a director in the American Manufacturing Company, I believe, from its inception.

Q. You were present at the meeting of December 15, 1945? A. Yes, I was.

(Testimony of Eugene F. Cunningham.)

Q. Which has been referred to? A. Yes.

Q. You stated, did you not, at that time that the real estate, that is lots 8, 9 in Block 2102 of the City of Tacoma had the craneway, the temporary craneway?

A. That is right, it did at that time.

Q. Now, at that time you owned the so-called Graybar Building which was adjoining?

A. At that time the Graybar Building was under construction. It was not occupied until May of '46, I believe, officially. [30]

Q. Then the party wall that has been referred to was completed when?

A. Early in '46, I think, between the latter part of '45 and '46. I believe we commenced operations around November in '45 and just what the status of construction was at that time I couldn't say, but I think it was nearing completion anyway.

Q. Now, the American Manufacturing Company's building was a higher building, was it not, than the Graybar Building?

A. That is right, considerably higher.

Q. So this wall had to be extended several feet, did it not? A. That is right.

Q. And if you recall, when was that work done?

A. I don't think I could tell you exactly when, I wasn't on the job all the time, that is, to try to pin it down a few days one way or the other, whether it was in '45 or '46, I don't think I could do so.

(Testimony of Eugene F. Cunningham.)

Q. Would you say it was done after this director's meeting that has been referred to?

A. Right, or about that time anyway.

Q. Now, you stated that the American Manufacturing Company's building was built primarily of hollow tile construction, is that right?

A. No, I don't make such a statement. [31]

Q. That is, of concrete blocks?

A. I didn't make such a statement.

Q. I will withdraw that question.

What was the type of construction used on the American Manufacturing Company's property?

A. So far as the roof and supporting members are concerned, you call it mill construction, simply beams across the top and covered by 2 by 6 tongue and groove material and a roof on top of it, that was the roof construction. The supporting structures were columns of wood both supporting the craneway as well as the building. Square timbers, in other words.

Q. What would be your statement as to the present condition today of this building?

A. I would say that as far as condition is concerned, it is in very fair condition.

Q. Could you estimate the future useful life of that building today?

Mr. Ogden: If you Honor please, I think we are getting a little, I am not criticizing the form of the question, but the matter at issue is the improvements placed upon the property subsequent to the first day of January, 1946. Now, that was not a

(Testimony of Eugene F. Cunningham.)

building, that was an improvement consisting of a roof, cement floors, and enclosed ends which doesn't of itself constitute a building. It became when finished a part of [32] this other structure that had been put on prior to January 1, 1946, the picture of which you have. So I think it cannot be termed as a building, it is an improvement and was so defined by the Commissioner and is the matter at issue.

The Court: Well, I take it that Mr. Welch is trying to determine the depreciation rate on it, are you, for the purposes of evaluation?

Mr. Welch: Evaluation and also to cross-examine the witness who made a statement with respect to obsolescence on direct examination.

The Court: Very well. I will have to allow some latitude in cross-examination.

Mr. Ogden: All right.

Mr. Welch: Will you read the question?

(Last question read.)

A. It is a difficult question. The useful life to the American Manufacturing Company undoubtedly would be twenty years, to anyone else, if they were to discontinue the use of it, it might have little or no value because of the character of the building. It is a very high building, special craneways in it. That is a difficult thing to estimate on a separate depreciation basis.

Q. (By Mr. Welch): Well, would you say that forty years from the date it was completed would be an optimistic estimate as to its life? [33]

(Testimony of Eugene F. Cunningham.)

A. I would say it would be very definitely optimistic.

Q. What would be your statement?

A. I think twenty years would be much more in order because of the obsolescence factor.

Q. That would be twenty years from the present date?

A. No, from the original erection date.

Q. Mr. Cunningham, you are not a real estate man, are you? A. No.

Q. That is, your experience as to values comes from a liquidation of machinery primarily, you say?

A. Yes, and experience in business in general over a period of some forty years.

Q. Could you state some or give an example rather, of a liquidation that you were personally involved in prior to 1946?

A. Cunningham Steel Foundry.

Q. Cunningham Steel Foundry? A. Yes.

Q. That was a business located where?

A. Steel foundry located 4200 West Marginal Way, in Seattle. It employed about 200 men during the war.

Q. Did that company own the real estate, building? A. Yes, sir.

Q. When was that liquidated? [34]

A. 1945 and '46, latter part of '45 and '46.

Q. At that time you were liquidating, or rather selling used machinery primarily?

A. I had previously been connected with the

(Testimony of Eugene F. Cunningham.)

Cascade Machinery here and had organized the company way back in 1918, and the Cascade was an outgrowth of the original companies, they were engaged at all times in the handling of machinery and liquidation of one kind and another.

Q. So you are familiar with salvage values?

A. I think so. We had a great deal of timber available at the Cunningham Steel Foundry in the properties that were not actually being closed, and I had endeavored to sell some of the material from time to time. I knew its value. It was generally the same type of construction as this. In fact, I did sell some of it.

Q. Then in stating your opinion you have referred to removal costs?

A. That is right. They have to be considered.

Q. You haven't attempted to give an opinion as to the value of these improvements as they exist, fixed and attached to the real estate?

A. No, I have not.

Mr. Welch: I have no further questions at this time, your Honor. [35]

Redirect Examination

By Mr. Ogden:

Q. Have you, Mr. Cunningham, any idea of the value of these improvements as they exist and placed there since 1946?

The Court: At what time?

Mr. Ogden: Well, counsel has been asking him at any time.

(Testimony of Eugene F. Cunningham.)

Q. (By Mr. Ogden): We will say now, what is the value of them today?

A. Today is exactly the same as it was in '46 as to market value on them. If you were to remove them they would have only salvage value and it would ve very, very nominal.

Mr. Ogden: Now, if your Honor please, I will bring it into the second assessment by the Commissioner. I know he will ask him in 1952, the termination of the lease, to make the date definite, because that is the date of reversion on which the second letter was based.

Q. (By Mr. Ogden): Does that answer hold to January 31, 1952? A. Yes, sir, it does.

Mr. Ogden: That is all.

Recròss-Examination

By Mr. Welch:

Q. Mr. Cunningham, do you know approximately the cost of these improvements that were made in 1946?

A. Yes, it was some \$11,000 or approximately that. [36]

Mr. Welch: No further questions.

Mr. Ogden: That is all.

The Court: I would like to ask the witness a question.

I believe, Mr. Cunningham, you said that at the time of construction and in 1952 and now the value of these improvements would be about the same if they were removed?

(Testimony of Eugene F. Cunningham.)

The Witness: That is right.

The Court: Did I understand you to say it would be, the value would be, just a few hundred dollars more than the cost of removal?

The Witness: That is right, the salvage value would be very nominal. It is difficult to say how much but I wager anything they wouldn't bring \$500.00.

The Court: Now, you have not expressed an opinion as to whether they were worth something more than that at any of these dates as the existing buildings on these lots?

The Witness: That is right.

The Court: Perhaps you would not care to express an opinion on the value of that, or are not qualified to do so?

The Witness: It would be a difficult question to answer as to what the value is, it would depend upon who to.

The Court: I have no further questions.

Mr. Ogden: This question now is following the questions that the Court asked you, the nature of the improvements [37] that were placed on the premises by the American Manufacturing Company after January 1, 1946, are they of such nature or character that they would be valuable to anyone occupying that property other than the American Manufacturing Company?

The Witness: That is another difficult question. It would just depend on whether it was a machine shop and manufacturer of light character came

(Testimony of Eugene F. Cunningham.)

along. If they did, they would naturally be of considerable value, otherwise they wouldn't.

Mr. Ogden: Do I understand you to say what value it would have to be a special value for special use?

The Witness: Well, let me put it this way. A roof always has some value, but the style and type of building is only valuable to one who is dealing in steel or heavy machinery and equipment of that nature and kind, because it is extremely high, the floors are low, you can't back a truck up, you must unload stuff off the truck. Now the Graybar Building is right alongside and is of truck height, low in ceiling, it is easy to heat, it a proper warehouse building. These are not proper warehouse buildings, they are of special purpose and they are valuable to anyone who can use them for that purpose or a similar purpose. Does that answer the question?

Mr. Ogden: Yes, I think that answers the question. Does that answer the Court's question?

The Court: It satisfies the Court. [38]

Mr. Ogden: That is all.

The Court: You are excused.

(Witness excused.)

The Court: We will take a short recess.

(Short recess taken.)

The Court: On the record.

Mr. Ogden: Mr. Melendy.

D. L. MELENDY

was called as a witness by and on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, Mr. Witness, and your address?

The Witness: D. L. Melendy, 323 North I Street, Tacoma.

Direct Examination

By Mr. Ogden:

Q. What is your business?

A. I am in the real estate business.

Q. How long have you been in the real estate business? A. Thirty-seven years.

Q. Have you had any experience in appraisal work? A. Yes.

Q. Give the Court some idea.

A. I have appraised for the State of Washington, Pierce County and the Federal Government. We just finished the appraisal [39] of the new county-city site in Tacoma, and that has been the principal part of my business in the last fifteen years, is appraisal work.

Q. Are you familiar with Lots 8 to 12, inclusive, of Block 2102 in the New Tacoma Fifth Addition?

A. Yes.

Q. Have you any idea of what those five lots were worth in 1946?

A. In the absence of comparable sales made in that area before 1946, that would be a yardstick for

(Testimony of D. L. Melendy.)

measuring the value, I went to the assessor's office to ascertain what the assessed value was. I find that about the turn of the century those lots had speculative value and they were appraised for taxation purposes according to the assessor's records at about \$2800, those five lots back perhaps forty years ago—or forty years before '46, that was about the time the Milwaukee Railroad came into Tacoma when they had some speculative value and a great many people bought lots there. But since that time there has been no activity in the sales of those lots. Taking the record of the county I would say that those lots are worth, in 1946 were worth approximately \$4,000, the five lots.

Q. Granted that the value of the five vacant lots was \$4,000, is there any formula or any method by which you could determine what a fair ground rental of these vacant lots would be? [40]

Mr. Welch: Now, I want to make an objection at this time, your Honor, that the method or formula for evaluating vacant property in Tacoma in 1946 is irrelevant to this proceeding. I might indicate to the Court so far as the value is concerned, these lots were actually purchased by Mrs. Cunningham and it has been so stipulated, in 1944 within, oh, I would say fifteen months of 1946, and the price is set forth therein that she paid. So far as the formula for valuing vacant land, I don't think it belongs in this proceeding. I don't think it is necessary for a decision in the case because really

(Testimony of D. L. Melendy.)

that isn't the issue. The issue is with respect to the improvements.

The Court: I understand your position, but if that is a part of the taxpayer's contention I am disposed to let in and decide what relevancy it may have later. It may not be relevant according to which of these indeed is correct, but I will allow it to go in for whatever it may be worth in the decision of the case. The objection is overruled.

Q. (By Mr. Ogden): How would you go about it to determine the ground value?

A. I might explain to the Court this, that the average individual who purchases such lots purchases them with the idea that some day they will be more valuable and I have a great many instances of property I have handled where we have [41] permitted signboard companies to use the lots for paying the taxes. Sometimes it didn't pay the taxes, but I would say that a fair rental value for those lots, based upon \$4,000 valuation, would be five per cent of the \$4,000 plus the taxes. Most any property owner would be glad to get an income on vacant lots because they are usually a liability.

The Court: May I interrupt to ask a question?

Mr. Ogden: Yes, sir.

The Court: If the \$4,000 should not be the proper valuation and the proper valuation some other figure evidenced by the purchase price paid by Mrs. Cunningham, would you say that the fair return would be five per cent of that other figure?

The Witness: Yes, I would.

(Testimony of D. L. Melendy.)

The Court: Plus taxes?

The Witness: I would say that it would be more than fair to the property owner because of the fact that when he buys vacant lots he does not expect to get any income out of them until they are improved or until the value has been enhanced and he can realize a profit.

The Court: Now, I would like to ask one other question. I suppose the location of the lots may have something to do with that, does it not?

The Witness: That is true.

The Court: Do I understand that these lots in 1946 [42] were in fairly close proximity to manufacturing plants?

The Witness: Yes, it is sort of in between. "A" Street at this point has a dead end two blocks north and as you go south about six blocks it goes into a gulch that is another dead end. It had practically no value from signboard—most vacant lots are used for signboard rentals in a district where it is that close into a city, but there was practically no traffic on "A" Street there because of the dead end street. To the north it ends, the dead end ends about Nineteenth Street, then starts again at Fifteenth Street. The union depot takes the street from about Nineteenth Street north.

The Court: You have taken all of that into consideration and the proximity to manufacturing concerns in fixing your valuation?

The Witness: That is right.

(Testimony of D. L. Melendy.)

The Court: I have no further questions. I didn't mean to interrupt the orderly procedure here.

Mr. Ogden: I have no further questions.

Cross-Examination

By Mr. Welch:

Q. Mr. Melendy, do you know what Mrs. Cunningham paid for these lots in 1944?

A. I do not. I was not informed of that. I was asked to place a valuation on those lots approximately ten years ago and I don't know what the sale was to Mrs. Cunningham, or for [43] her.

Q. For your information I will read from stipulation of facts and the first sentence of paragraph 8 which is a fact-wise agreed upon for purposes of deciding this case, it says "On October 26, 1944, Grace H. Cunningham purchased Lots 7 to 12, that would be 6 lots, inclusive, of Block 2102 at a price of \$8,000." Now, what I want to ask you is whether prices generally of this type of land increased or decreased as between 1944 and 1946?

A. Well, about the same time across the street a building that had a valuation of at least \$40,000 was sold for around \$30,000 and it occupied, I think, five lots. This was practically the only sale that has been made in that area for a good many years of vacant lots.

Mr. Ogden: May I say, counsel, I am not going to quarrel about the valuation, we have stipulated what she paid for it. Now, these men have stated their own judgment. It is stipulated what she paid

(Testimony of D. L. Melendy.)

for the lots in '44. Primarily what I want for the witness is how you fix ground rental, irrespective of the problem being stated in this wise, the value of a certain piece of unused empty property, vacant property is "X," how would you figure or ascertain the ground value of "X"? Now, I would just as soon it be that as any particular value. It is a question of how you arrive at the rental. Of course, the top price would be the price Mrs. Cunningham paid which [44] would be \$1,333.00 a lot.

Mr. Welch: In view of Mr. Ogden's representations, I have no further questions of this witness.

The Court: That is all then, you are excused.

(Witness excused.)

Mr. Ogden: Call Mr. Greenstreet.

KELVIN GREENSTREET

was called as a witness by and on behalf of the petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address, please?

The Witness: Kelvin Greenstreet, 2445 West Lynn, Seattle.

The Clerk: What was your first name?

The Witness: K-e-l-v-i-n.

Mr. Welch: If your Honor please, I have here a typewritten statement, the qualification of the witness. Now, I don't know what the practice in this Court is to file that, give it to the Court and file it

(Testimony of Kelvin Greenstreet.)

or shall I read it into the record? These are his qualifications. I can read them into the record. Ordinarily our practice here on an expert witness is to qualify him and he generally has with him his qualifications. I can read them in the record or file them.

The Court: If counsel for the respondent agrees they [45] may be read in the record. Normally, however, you ask the witness his qualifications under oath.

Mr. Welch: I would prefer, your Honor, that the witness be interrogated with respect to his qualifications.

The Court: Very well.

Direct Examination

By Mr. Ogden:

Q. Will you state your qualifications as to your experience in the field of appraisals and valuations of real property?

A. Beginning in 1938 I entered the real estate business as a salesman with Curtiss Milbrook and under him studied appraisal work as well as doing property management. After two years I became an appraiser for the Federal Housing Administration, in 1943 I was given charge of the subdivisions of large-scale development of single-family homes, handling the appraisals of them as well as the design and layout. In 1945 I became assistant chief appraiser for FHA. In 1947 I was assigned to

(Testimony of Kelvin Greenstreet.)

handle the apartment house program called the 608 rental housing program, appraised some \$40,000,000 worth of apartment houses throughout the western part of the state at that time. Then from 1950 to 1955 I was the chief property manager for Federal Housing Administration and managed a 544-unit apartment project, together with a 150-unit rental project in Tacoma. I might state that in Tacoma I handled the appraisal [46] which resulted in the construction of Park towers and several other apartment houses. As late as two months ago I appraised the new post office building in the City of Tacoma for the General Services Administration. That is generally my experience.

Q. What positions do you now hold in professional societies, appraisal societies, if any?

A. I am a member of the real estate board of Seattle and chairman of the appraisal committee of the real estate board, and a member of the Society of Residential Appraisers, a member of the Right-of-Way Association, president of the American Institute of Real Estate Appraisers.

Q. Mr. Greenstreet, I think just as you came into the courtroom I made a statement that it was the desire of the taxpayer to introduce evidence before this Court as to an accepted method, if any there be, to determine a fair ground rental on unoccupied real property. Have you had any experience or do you know of any method whereby fair ground rental can be determined from the valuation or the location of vacant real property?

(Testimony of Kelvin Greenstreet.)

A. Yes, the value of ground rental is a common problem in the center of large metropolitan cities and in the more hilly retail areas where land values are high, many people own property, just the land and not the building, the land is held and they expect a certain return and it will vary as to the [47] quality of the neighborhood and the possible use of the land. Now, as you broaden out and reach the periphery of the high retail centers fewer and fewer people hold land as a rental investment. However, there are cases where they do, and in the outlying areas as I understand your subject case is here usually you start with a hypothetical new building and determine what is fair rate of capitalization would be on that hypothetical new building, allow a reasonable amount for depreciation, and the remainder would be the rental value of the land.

Q. This land in question are lots 5 to 7 in Block 2102 of the Fifth Addition to the City of Tacoma and lots 8 to 12 in Block 2102. This property is about three blocks from the depot, it is bounded on the south by Twenty-second Street, and on the east by "A" Street, and on the west by a 40-foot alley. The question is in 1946, January 1, what would be the fair rental value of this property? Now, there has been a stipulation of fact filed in this case in which counsel for both the Government and the taxpayer have agreed. In that stipulation of fact this property, with these lots at that time six of them were purchased for \$8,000. One of those lots has been sold. That leaves five lots and the lot that was

(Testimony of Kelvin Greenstreet.)

sold was sold for a consideration of one-sixth of \$8,000, so that leaves the five lots remaining and the value per lot would be \$8,000 divided by six, which would be \$1,333.33. That would [48] make these five lots valued at roughly around \$6,000. What would this vacant property, what would be a fair ground rental on this vacant property with a valuation of roughly \$6,666 in 1946, in your opinion, and how would you arrive at it?

A. Assuming that a commercial type of building would be erected upon the property as I understand it, the zoning in that particular area is commercial, light manufacturing, and assuming a light manufacturing commercial building would be erected upon the property, normally a nine per cent capitalization rate would apply, and that type of improvement is generally given a two and a half per cent depreciation which leaves you a return to the land of six and a half per cent. Therefore, six and a half per cent would be the return based upon your statement that the land is worth \$6,000, then, six and a half per cent would be, of that, would be the return per year, approximately \$380.00.

Q. Would that be plus or minus the taxes?

A. That would be a net return, taxes having been paid by the party who owned the building.

Q. The lessee would pay the taxes under that situation? A. Yes.

Mr. Ogden: That is all.

The Court: Can you figure precisely what that figure would be according to that calculation?

(Testimony of Kelvin Greenstreet.)

The Witness: Six times six and a half, \$380.00 per [49] year.

Mr. Ogden: How much?

The Witness: \$390.00 per year.

Mr. Ogden: You may examine unless the Court has some questions.

Cross-Examination

By Mr. Welch:

Q. Mr. Greenstreet, that \$390.00 a year is based upon an assumed valuation of \$6,000?

A. Yes.

Q. You are not familiar with this particular piece of property, that is, you don't have this property individually in your mind, do you?

A. I have a general idea. I am generally familiar with the area, but I have not made a specific inspection of the property.

Mr. Welch: I have no further questions at this time, your Honor.

Mr. Ogden: I have no further questions.

The Court: Very well. Thank you, sir, you are excused.

(Witness excused.)

Mr. Ogden: Mrs. Cunningham, will you take the stand?

Q. When was the American Manufacturing Company itself incorporated? A. 1936.

Q. State to the Court what is your position with the American Manufacturing Company?

A. I am general manager and the financial head of it.

Q. Was this your position in 1946?

A. Yes. It has always been my position. [51]

Q. In 1945, coming now towards the end of the year of 1945, state to the Court whether or not the American Manufacturing Company was seeking to expand its business or——

GRACE H. CUNNINGHAM

was called as a witness by and on behalf of the petitioner, and, [50] having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address?

The Witness: Grace H. Cunningham, 2026 Louisa Street, Seattle.

Direct Examination

By Mr. Ogden:

Q. Where is your place of business, if any?

A. 2119 Pacific Avenue, Tacoma.

Q. With what company or corporation are you connected with?

A. American Manufacturing Company, Incorporated.

Q. When did you first engage in the character of business now operated by the American Manufacturing Company? A. In 1928.

Q. When? A. In 1928.

(Testimony of Grace H. Cunningham.)

A. (Interrupting): The American Manufacturing Company either had to expand their business in that location or had to move to another location. They did not have space enough in which to operate.

Q. Was there at that time any land available for use for the expanding business of American Manufacturing Company?

A. Yes, directly in back of the present plant on Pacific Avenue there were five lots facing "A" Street directly across an unimproved alley.

Q. State whether or not the American Manufacturing Company since, and its predecessor in interest since 1928 had been making any use of those vacant lots?

A. They have used them ever since 1928.

Q. During the period of time from 1928 to 1944, did the American Manufacturing Company pay anything to the owners of record, owners of the property, for their use of the lots?

A. They paid approximately \$110.00 for the use of them which was \$10.00 per month from 1944 to approximately February, 1945.

Q. Is that all of the money that was ever paid?

A. That is all of the money that we ever paid; prior to that we had always used them for [52] nothing.

Q. How did it come about that you paid \$110.00 for that period of time?

A. Well, we erected a craneway and the owners of the property thought that we possibly should pay something for them and give them an agreement to

(Testimony of Grace H. Cunningham.)

remove the craneway. We did not own the property when we built the craneway.

Q. I hand you now a photograph, and ask you to state, if you will, what that photograph shows?

A. This is the craneway that we erected to lot No. 9, which is 25 feet by 120 feet long.

Q. Does that show the craneway?

A. Yes, it does.

Mr. Ogden: I should like to introduce that in evidence if I might and have it marked Petitioner's Exhibit No. 5.

Mr. Welch: Could I inquire as to this?

Mr. Ogden: Yes.

Mr. Welch: Tell the Court, please, if you recall, approximately when this picture was taken?

The Witness: It was taken approximately 1944, I believe. We erected the craneway in 1944.

Mr. Welch: And this is the craneway in the almost-completed condition?

The Witness: Yes, this is the craneway on Lot No. 9.

The Court: I think you are looking at different pictures, aren't you? [53]

The Witness: It should be the same picture.

The Court: Is that the same picture?

The Witness: Yes.

Mr. Welch: I have no objection, your Honor.

The Court: It will be received.

(Petitioner's Exhibit Number 5 was marked for identification and received in evidence.)



PETITIONER'S EXHIBIT NO. 5



2

(Testimony of Grace H. Cunningham.)

Q. (By Mr. Ogden): Looking now at the photograph, state to the Court what else was done with this craneway other than as depicted by this picture?

A. In 1945 we closed in the outside by putting large steel and glass windows about 17 by 18 feet.

Q. Was that for the full 120 feet?

A. Full 120 feet, correct.

Q. When, if at all, did you buy these lots?

A. In 1944.

Q. In——

A. (Interrupting): Approximately October, 1944.

Q. October, 1944? A. Correct.

Q. Will you state to the Court why you bought these lots?

A. I bought them so that my company, the American Manufacturing Company, had working space. They couldn't afford to [54] buy them themselves.

Q. At this time——

Mr. Welch (Interrupting): ——I want to make a motion to strike the last part of the answer.

The Court: It will be stricken as not responsive.

Q. (By Mr. Ogden): At this time in 1945, the latter part thereof, was there any negotiations entered into between the American Manufacturing Company and yourself respecting these lots in question, the five lots?

A. They were to use the five lots for nothing, provided they paid the taxes, any improvements

(Testimony of Grace H. Cunningham.)

that they put on them were not to be of any cost to me. They had been using them since 1928 and they wanted to continue on using them.

Q. Was there at the time of this arrangement, namely, the agreement you refer to of the last part of 1945, was there an oral agreement covering what they might do with these lots? A. Yes.

Q. Now, state to the Court what that oral agreement was?

A. The oral agreement was that they were to, that they could erect an addition to the present craneway.

Q. That would cover what lot?

A. Lot No. 8.

Q. And what was on the other side of Lot No. 8?

A. The Graybar Building. [55]

Q. Lot No. 8 was 25 feet in width the same as 9?

A. Correct, by 120 feet long.

Q. State to the Court whether or not there was any intent on the part of yourself as owner of these five lots and the American Manufacturing Company relative to rent? A. There was—

Mr. Welch (Interrupting): May I object at this time, your Honor? Petitioner's counsel is asking petitioner to state a conclusion which is a matter for the Court to decide, this question of intent with respect to rent is very, very close to the case itself, and the issue of the case.

The Court: I understand it, Mr. Welch. May I ask the witness a question or two?

I believe you said, Mrs. Cunningham, that you

(Testimony of Grace H. Cunningham.)

started out with an oral agreement here and later there was a written agreement?

Mr. Ogden: That is right, a year and two months later.

The Court: Now, you say there was an agreement between yourself as owner of the lots and the company? What is the name of the company?

Mr. Ogden: American Manufacturing Company.

The Court: American Manufacturing Company. Now, with whom did you have such an agreement? As I understand it you were the owner of the [56] company?

The Witness: I control the stock.

The Court: Were you dealing with yourself or were there others who entered into this agreement?

The Witness: I was dealing with my brother, Thomas Gepford.

The Court: And yourself on the other hand?

The Witness: Yes.

The Court: And yourself singly on the other?

The Witness: That is right.

Mr. Ogden: I might suggest that when you look at the minutes of the meeting it recites that she was not in the room at the time the matter of the authorization on behalf of the corporation to rent these—to take these properties over and build the building, because where interested she withdrew from the meeting.

The Court: That applies to the oral agreement?

Mr. Ogden: Yes.

The Court: Now I understand your objection, Mr. Welch. You had the same objection awhile ago.

(Testimony of Grace H. Cunningham.)

Mr. Welch: Yes.

The Court: I was inclined at that time to agree with you that we were coming pretty close to having the witness testify as to a legal conclusion that this Court is going to have to reach itself. However, I am going to receive her answer on this for whatever it may be worth, but I am going to [57] warn you that the Court is going to take into consideration all the evidence.

Mr. Ogden: I certainly agree with that and it is being introduced on the basis of proving intent and that right to prove intent is based on many, many cases involving identical situations of determining what was the agreement relative to structures placed by a lessee upon his property.

The Court: The objection is overruled. The witness may answer.

A. I had no intent of rent. I was only concerned with acquiring additional space for my company so that they could exist in that location.

Q. (By Mr. Ogden): Do you know whether or not the American Manufacturing Company, after January 1, 1946, did place any improvements on this property?

A. They placed a 25 by 120-foot structure, a roof, a floor, and two ends which adjoined the Graybar Building.

Q. The stipulation entered into and now on file states that the cost of this improvement to which you have just testified was \$11,094?

A. Correct.

Q. Does \$11,094 represent the amount paid by

(Testimony of Grace H. Cunningham.)

the American Manufacturing Company for these improvements? A. That is right. [58]

Mr. Ogden: I am going to ask this exactly in the wording of the Commissioner in his letter.

Q. (By Mr. Ogden): Were these the improvements that were to revert to you under the terms of the lease on the first day of January, 1952?

A. Yes, correct.

Q. Referring now to your connection with the company as its manager, how much time do you put in? A. Six days a week.

Q. Six days a week? A. Correct.

Q. On January 1, 1946, how much money did the American Manufacturing Company at that date owe to banks?

A. They owed about \$100,000 to the bank plus about \$125,000 to Cunningham Steel Foundry.

Q. That is as of the date that you purchased the property in October, '44?

A. Approximately \$41,000 to Puget Sound National Bank at Tacoma.

Q. Now coming to January 1, 1946, what was the approximate amount they owed the banks?

A. They owed the bank about \$172,000.

Q. Were you personal endorser and guarantor on there? A. I was and still am. [59]

Q. What did they owe at the end of 1946?

A. About \$184,000.

Q. Were you also the endorser and guarantor on that? A. Yes.

Q. In the year 1952, being six years after the

(Testimony of Grace H. Cunningham.)

agreement was entered into on January 1, 1946, what, if anything did you then do with regard to these lots on which these improvements had been placed?

A. I entered into another agreement with the American Manufacturing Company at \$10.00 per month for a period of ten years.

Mr. Ogden: A copy, if your Honor please, of that lease is attached to the stipulation.

Q. (By Mr. Ogden): During the six-year period following January 1, 1946, was there any change in the buildings made by the American Manufacturing Company, drawing your attention to the south wall?

A. In September, 1951, we removed the south wall and moved it on over into another section that we were constructing at that time. We took out the entire south wall, moved it onto Lot No. 10.

Q. Were the improvements placed upon these properties after January 1, 1946, of a permanent nature?

A. I would say not, due to the fact that they were [60] specially constructed for one particular purpose, that was for the manufacture of the type of machinery that we were making, and I wouldn't call them of permanent nature. In fact, if I was not connected with American Manufacturing Company I wouldn't want them on the property.

Q. Can you give the Court any idea of what the working life, normal life in terms of years, of the

(Testimony of Grace H. Cunningham.)

improvements put on the property by the Manufacturing Company during the time mentioned would be?

Mr. Welch: I don't think this witness is qualified as an expert to give an opinion of that nature.

Mr. Ogden: Well, I don't know, if your Honor please, she is the manager of the company that built it and she is the manager of the company that owns the surrounding property, adjoining property. If she doesn't know by actual experience, there are two schools, one of education and one of practice. She might not have a record of being an appraiser or being in real estate, but as a practical matter she probably knows more about it than anyone else.

The Court: What are you asking her?

Mr. Ogden: Her estimation in number of years of these properties that were—this improvement that was put on there.

The Court: Are you speaking about the physical life or the obsolescence or useful life, or what? [61]

Mr. Ogden: We will include them all, useful life or obsolescence or whatever in their opinion they would be, will they be obsolete. They have already testified that one whole side was torn away and taken somewhere else.

The Court: It sounds rather nebulous. Why don't you ask her each one of the things and I will accept her estimate of these things.

Q. (By Mr. Ogden): Do you think that these improvements that were placed upon the property

(Testimony of Grace H. Cunningham.)

by the American Manufacturing Company subsequent to January 1, 1946, have a useful life in excess of twenty years?

A. I don't believe so. I believe that by the time American Manufacturing's present lease, which expires in 1962, I believe that as far as they are concerned the buildings will be obsolete and will have be torn down and a new type of building put up.

The Court: You say obsolete. Why would they be obsolete, you mean just so far as that company is concerned?

The Witness: That is correct, yes.

Q. (By Mr. Ogden): Is the nature of the improvements such that it would be characterized as a special construction or a general improvement?

A. It is a special construction, the buildings are constructed [62] very high.

Q. For a special use?

A. Yes, for our special type of manufacture. They wouldn't have much value to anyone else unless they were doing similar manufacture and there is nobody else in the City doing similar manufacture to ours. In fact, I think I would have great difficulty in doing anything with them.

The Court: And yet, Mrs. Cunningham, in the lease I believe it is stipulated that those will remain on the property as your property at the end of the lease?

The Witness: That is right, but I believe if I was not connected with American Manufacturing, or if I was severing any connection with Amer-

(Testimony of Grace H. Cunningham.)

ican Manufacturing, I would have them give me an agreement to remove the improvements.

The Court: The oral agreement, is there any summary in the stipulation as to what the oral agreement was?

Mr. Welch: Yes, your Honor, in paragraph 11, the stipulation of facts, we stipulated that the minutes of the meeting substantially set forth the terms of the oral lease which was later reduced to writing in a written lease dated March 17, 1947. They are referring to Exhibit 2-B.

The Court: In other words, the terms of the oral lease were similar in its terms to the written lease?

Mr. Welch: That is right, and the oral lease is substantially set forth in the minutes which is Exhibit 2-B. [63]

Mr. Ogden: The stipulation is that it substantially sets forth the oral agreement. That is the reason, if your Honor please, that inasmuch as there was an oral agreement and by the time that they have got around to finally drawing this lease in March, 1947, the improvements had long since been in and it was an occupancy and that is the reason I am directing attention to this oral agreement because it was under that that they operated because they certainly didn't operate under any written agreement, because it wasn't in existence.

Q. (By Mr. Ogden): State to the Court whether or not in your opinion, as the owner of these lots, the improvements put upon the property

(Testimony of Grace H. Cunningham.)

by the American Manufacturing Company after after January 1, 1946, lent any value or additional value to the property other than vacant property so far as you are concerned as an owner?

Mr. Welch: I object, your Honor, that again calls for an opinion and it also involves a conclusion more or less as it relates to this case. She is asked to state whether the improvements which admittedly cost something in excess of \$11,000, in her opinion added anything to the value of the vacant land, and I think that calls again for expert testimony. It can't be answered by this witness.

The Court: I am inclined to agree with counsel except that I think the owner of the property and the petitioner here has a right to express her opinion. [64]

Mr. Ogden: Yes.

The Court: Now, for whatever it may be worth, I will receive her answer on that. It goes to the weight of the evidence.

A. As the property owner, I would say they had no value. I wouldn't want them on there if I was just the property owner. I would want the buildings off.

Q. (By Mr. Ogden): How was the account relative to the money expended by the American Manufacturing Company on the lots in question carried on the books of the American Manufacturing Company, if you know?

The Court: I understood that that was stipulated, is that correct?

(Testimony of Grace H. Cunningham.)

Mr. Ogden: I think that is stipulated. I withdraw that question, it is in the stipulation.

Q. (By Mr. Ogden): Coming now to the party wall agreement, Mrs. Cunningham, when was that entered into, if you know?

A. The party wall agreement?

Q. Yes.

A. I believe 1946. I am not real definite on the date, but I believe it was 1946.

Q. The party wall agreement, did that have anything to do with the oral agreement of the lease, was it a part of your [65] oral agreement of the lease, the party wall? A. Yes.

Q. In what respect?

A. I don't know exactly what you mean, Mr. Ogden.

Q. Well, I will ask the question in another way. The party wall agreement recites that yourself and the American Manufacturing Company are the joint owners? A. Correct.

Q. Of one-half interest in that party wall?

A. That is right.

Q. Is that right? A. Yes.

Q. The price of that party wall has been set forth in the stipulation. Has there been any change from that date to this in the ownership of that party wall with respect to yourself and the American Manufacturing Company?

A. None whatever.

Mr. Ogden: I think that is all.

(Testimony of Grace H. Cunningham.)

Cross-Examination

By Mr. Welch:

Q. Mrs. Cunningham, you were present, were you not, at the directors' meeting of December 15, 1945, when the oral lease was entered into?

A. Yes.

Q. And you are familiar, are you not, with the contents [66] of the minutes that are part of the stipulation?

A. Yes.

Q. And you knew at the time that the American Manufacturing Company undertook the improvements that these improvements would become yours at the end of the six-year period?

A. Correct.

Q. And you are aware that that was later entered into in a written lease agreement?

A. That is right, yes.

Q. Now, American Manufacturing Company insures these buildings, does it not?

A. Correct, yes.

Q. Will you state, if you know, whether or not you personally are insured against any possible loss, fire or any other casualty as to these improvements?

A. Do you mean do I carry personal insurance?

Q. Or does the policy which the company carries also protect you?

A. No.

Q. Could you state, if you know, approximately when the additions were made to the party wall between the American Manufacturing Company and the Graybar Building?

(Testimony of Grace H. Cunningham.)

A. They were made approximately in November, 1945.

Q. That is, the party wall itself?

A. Yes, that is the first section that was put up. [67]

Q. When was the addition to the party wall?

A. You mean the improvement to the 25-foot section that was already up between that section and the Graybar wall?

Q. Yes.

A. That went up at about the same time that the Graybar wall went up. It had to go up in one unit pretty much.

Q. Is the American Manufacturing Company's building, is that much higher than the Graybar Building?

A. It is approximately eight to ten feet higher than the Graybar Building.

Q. You stated that a certain portion of the American Manufacturing Company's building was moved to Lot 10 of this same block?

A. The south wall.

Q. That is the south wall?

A. The south wall was removed from Lot 9 and put on Lot 10.

Q. Which you also own?

A. I own all of the lots.

Q. And approximately when was that wall, the south wall, moved?

A. It was September, 1951.

(Testimony of Grace H. Cunningham.)

Q. Do you know approximately the cost of that subsequent improvement?

A. Of the south wall that we moved? [68]

Q. Yes. A. It was approximately \$2,550.

Q. The American Manufacturing Company is required to keep and maintain the building and these improvements in good condition, is it not?

A. That is correct.

Q. What would you say their condition was at the present time?

A. Well, it is about the same condition that you would find in any wooden structure building, the roof has to be renewed about every three years, it has a car decking roof with laminated paper, tar and paper roof, that is renewed about every three years. We have to keep the roof in good condition or we wouldn't keep workmen. But it deteriorates in about another three to five years.

Mr. Welch: I have no further questions.

Mr. Ogden: If your Honor please, I have no further questions, but there is one matter now I want to take up with the Court and to this my friend across the table is going to object because he has already told me so.

The Court: You are excused, Mrs. Cunningham.

(Witness excused.)

Mr. Ogden: I do now want to introduce in evidence the original—a copy of the original report of the agent.

The Court: For what purpose? [69]

Mr. Ogden: For the purpose he sets forth in his report the reason for levying the additional assessment. He also sets forth his computation of how he arrives at the figure. That same computation and that same figure is carried clear through. This is the base of the whole procedure. And I should like very much to have it introduced in evidence.

The Court: What objection does the respondent have to allowing it in for that purpose?

Mr. Welch: If your Honor please, of course the 90-day deficiency letter states for itself in this respect, the revenue agent's report is not really a binding document on the Commissioner, it is merely the revenue agent's own view as to the controversy and sets forth a proposed deficiency based upon his opinion as to the nature of the controversy, and, of course, that is all more or less measured when the deficiency letter is issued, and I think the deficiency letter should cover the Government's position in this proceeding. We shouldn't have to necessarily consider ourselves bound by the contents, particularly the legal statements that are contained therein.

The Court: The Commissioner's determination is contained in the deficiency letter, is that your position, anything prior to that is preliminary and doesn't represent the Commissioner's final action. Is there any particular reason why you need to know what some of the preliminary conclusions or opinions were of the agent, Mr. Ogden? [70]

Mr. Ogden: The agent sets forth the reasons why he levies this assessment and he sets forth a

ruling of the Department upon which he bases his authority to make this assessment. From that position the Commissioner has seen fit to move away. Then the Commissioner comes along and he gets a 90-day letter in which he carries exactly the same figures and comes to exactly the same conclusion of \$6,730.84, alleging that that was the gross income subject to tax because the building at that year of '46 was—the improvements were erected in '46, then he comes along a little later and changes his mind again and levies another assessment which is some \$2,000, pretty near \$3,000 more than the year 1952.

Now, it seems to me that I have a right to—I know this isn't binding on the Commissioner, I know that, but I do think that I have a right to show what was—how did it all start and why did it start and here is why it started. The Commissioner comes along and while he doesn't—

The Court (Interrupting): I don't think we are concerned with why, we are concerned with what the Commissioner did, his deficiency notice and whether he is correct as to '46 or '52. That is the question before the Court.

Mr. Ogden: Yes, or at all.

The Court: That is right. Now, the revenue agent's report cannot be accepted to prove any facts.

Mr. Ogden: That I agree to. [71]

The Court: I don't see how we are concerned with what went on before that, before the issuance of the notice of deficiency, it is inter-office work-

ings. I am frank to say that if that is put in, I don't think it will have any effect at all on the case. I would be inclined to let it in unless the Commissioner objects strenuously, telling you all the while that I don't know that it can be of any value in determining the case.

Mr. Ogden: I don't know, to be very frank, at this minute now I don't know whether the Commissioner bases his right to levy these assessments on the same grounds as the revenue agent or on what grounds he does it. I haven't yet been told.

The Court: Well, it doesn't make too much difference to the Court. I suppose it can be argued in the briefs and it will be up to the Court to determine what the grounds are, whether there are any proper grounds for taxing it in either one year or the other. Unless you insist I think I would prefer not to have the record encumbered with it.

Mr. Welch: Respondent rests.

The Court: How about briefs?

Mr. Ogden: I don't know how long it will take to get a brief ready. As far as I am concerned this matter was briefed once before when we had the hearings here. I could have a brief ready in ten days or two weeks or I can have it [72] ready in whatever anybody says.

The Court: The Court is in no great hurry. I have an abundance of work. You may have whatever reasonable amount of time you would like.

Mr. Welch: The respondent would like sixty days.

The Court: Do you want to file simultaneous briefs, sixty days?

Mr. Ogden: I do not know if that is the custom in the department. It is quite all right providing it is understood that I would have an opportunity to reply.

The Court: Thirty days thereafter you will have an opportunity to reply to each other's briefs.

The Clerk: Those dates are July 16 and August 16, counsel.

The Court: Very well, the case will stand submitted when the briefs are submitted.

We will take a five-minute recess.

Mr. Ogden: I am through with this case.

The Court: Is everything concluded?

Mr. Welch: Respondent rests.

The Court: Well, the case will stand submitted. We will take a short recess before going on with the next case.

(Whereupon, at 12:05 o'clock p.m., the hearing in the above-entitled petition was closed.)

Filed June 6, 1956, T.C.U.S. [73]

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 55090

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

GRACE H. CUNNINGHAM,

Respondent on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on June 25, 1957, ordering and deciding that there is no deficiency in income tax for the year 1946.

This petition for review is filed pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

Taxpayer Grace H. Cunningham's individual income tax return for the year 1946, was filed with the Collector of Internal Revenue at Tacoma, Washington, which office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Nature of Controversy

Taxpayer Grace H. Cunningham was a principal stockholder and general manager of the American Manufacturing Company, Inc. In December, 1945, she entered into an oral lease with the corporation under which she agreed to lease certain unimproved land to the corporation for a term of six years commencing January 2, 1946. The corporation was obliged to construct a building of the approximate value of \$25,000 on the leased premises and to pay all taxes. The consideration for the lease was stated to be the transfer by the corporation of all its right, title and interest in the building at the end of the term of the lease.

Section 22(b)(11) of the Internal Revenue Code of 1939 provides that income, other than rent, derived by a lessor upon the termination of a lease and attributable to improvements made by a lessee shall be excluded from gross income.

The Commissioner contended that the transfer of the improvements at the end of the term of the lease was intended to be in lieu of rent so that the taxpayers realized taxable income in 1952 equal to the value of the improvements. In the alternative, the Commissioner contended that the erection of the improvements in 1946 was intended to be in lieu of rent so that the taxpayer Grace H. Cunningham realized taxable income in 1946 equal to the commuted value of her right to receive the improvements upon the termination of the lease. The Tax

Court held that the petitioner did not realize taxable income as a result of such improvements either at the time of construction thereof or upon termination of the lease.

/s/ CHARLES K. RICE, C.A.R.
Assistant Attorney General;

/s/ NELSON P. ROSE, C.A.R.
Chief Counsel,
Internal Revenue Service.

Filed September 16, 1957. T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Raymond D. Ogden, Esq.,
460-464 Olympic National Bank Building,
Seattle 4, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 16th day of September, 1957, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled

cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 16th day of September, 1957.

/s/ NELSON P. ROSE, C.A.R.
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Service of Copy acknowledged.

Filed October 2, 1957, T.C.U.S.

[Title of Court of Appeals and Cause.]

Docket No. 55090

NOTICE OF FILING PETITION
FOR REVIEW

To: Mrs. Grace H. Cunningham,
2026 Louisa Street,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 16th day of September, 1957, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 16th day of September, 1957.

/s/ NELSON P. ROSE, C.A.R.
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Service of Copy acknowledged.

Filed October 2, 1957, T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket No. 55091

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on June 25, 1957, ordering and deciding that there is no deficiency in income tax for the year 1952.

This petition for review is filed pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

Taxpayers' joint income tax return for the year 1952 was filed with the Collector of Internal Revenue at Tacoma, Washington, which office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Nature of Controversy

Taxpayer, Grace H. Cunningham, was a principal stockholder and general manager of the American Manufacturing Company, Inc. In December, 1945, she entered into an oral lease with the corporation under which she agreed to lease certain unimproved land to the corporation for a term of six years commencing January 2, 1946. The corporation was obliged to construct a building of the approximate value of \$25,000 on the leased premises and to pay all taxes. The consideration for the lease was stated to be the transfer by the corporation of all its right, title and interest in the building at the end of the term of the lease.

Section 22(b)(11) of the Internal Revenue Code of 1939 provides that income, other than rent, derived by a lessor upon the termination of a lease and attributable to improvements made by a lessee shall be excluded from gross income.

The Commissioner contended that the transfer of the improvements at the end of the term of the lease was intended to be in lieu of rent so that the taxpayers realized taxable income in 1952 equal to the value of the improvements. In the alternative, the Commissioner contended that the erection of the improvements in 1946 was intended to be in lieu of rent so that the taxpayer, Grace H. Cunningham, realized taxable income in 1946 equal to the commuted value of her right to receive the improvements upon the termination of the lease. The Tax Court held that the petitioner did not realize taxable

income as a result of such improvements either at the time of construction thereof or upon termination of the lease.

/s/ CHARLES K. RICE, C.A.R.
Assistant Attorney General;

/s/ NELSON P. ROSE, C.A.R.
Chief Counsel,
Internal Revenue Service.

Received and Filed September 16, 1957, T.C.U.S.

[Title of Court of Appeals and Cause.]

Docket No. 55091

NOTICE OF FILING PETITION
FOR REVIEW

To: Raymond D. Ogden, Esquire,
460-464 Olympic National Bank Building,
Seattle 4, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 16th day of September, 1957, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 16th day of September, 1957.

/s/ NELSON P. ROSE, C.A.R.
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Service of copy acknowledged.

Received and filed October 2, 1957, T.C.U.S.

[Title of Court of Appeals and Cause.]

Docket No. 55091

NOTICE OF FILING PETITION
FOR REVIEW

To: Grace H. Cunningham,
Eugene F. Cunningham,
2026 Louisa Street,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 16th day of September, 1957, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 16th day of September, 1957.

/s/ NELSON P. ROSE, C.A.R.
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Service of copy acknowledged.

Received and filed October 2, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

Docket Nos. 55090, 55091

ORDER ENLARGING TIME

On motion of counsel for petitioner on review,
it is

Ordered: That the time for filing the record on
review and docketing the petitions for review in the
United States Court of Appeals for the Ninth Cir-
cuit is extended to December 15, 1957.

/s/ J. E. MURDOCK,
Judge.

Dated: Washington, D. C., October 2, 1957.

Served October 3, 1957.

Entered October 3, 1957.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 20, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," including exhibits 1-A thru 4-D attached to the stipulation of facts and petitioners' exhibit 5, admitted in evidence, in the cases before the Tax Court of the United States docketed at the above numbers and in which the respondent in the Tax Court has filed petitions for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 10th day of December, 1957.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15815. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Grace H. Cunningham, Eugene F. Cunningham and Grace H. Cunningham, Respondents. Transcript of the Record. Petitions to Review a Decision of The Tax Court of the United States.

Filed December 12, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15815

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

GRACE H. CUNNINGHAM,

Respondent.

STATEMENT OF POINTS ON WHICH PETI-
TIONER INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
TO BE PRINTED

Pursuant to Rule 19(6) of the Rules of the Court of Appeals for the Ninth Circuit, the Commissioner of Internal Revenue, the petitioner herein, hereby designates the following statement of points upon which he intends to rely on appeal.

With respect to the appeal of T.C. Docket No. 55091, the Commissioner contends:

1. The Tax Court erred as a matter of law in failing to hold that taxpayers, Eugene F. Cunningham and Grace H. Cunningham, realized taxable income in 1952 equal to the then fair market value of improvements constructed by the lessee in 1946 upon the property involved subject to a six-year lease and which reverted to taxpayers in 1952 at the termination of the lease.

2. The Tax Court's finding that the value of the improvements made by the lessee did not represent rent upon termination of the lease in 1952 is clearly erroneous.

3. The Tax Court erred in failing to find the amount of the gross income received in 1952 by taxpayers, Eugene F. Cunningham and Grace H. Cunningham, attributable to the improvements placed upon the property by the lessee.

The Commissioner alternatively contends, with respect to the appeal of T.C. Docket No. 55090, as follows:

1. The Tax Court erred as a matter of law in failing to hold that taxpayer, Grace H. Cunningham, realized taxable income in 1946, as lessor, equal to the January 2, 1946, fair market value of improvements constructed by the lessee upon taxpayer's property, which improvements, pursuant to the lease, were to and did revert to taxpayer at the end of the six-year term.

2. The Tax Court's finding that the value of the improvements made by the lessee did not represent rent at the time of construction in 1946 is clearly erroneous.

3. The Tax Court erred in failing to find the amount of the gross income received in 1946 by taxpayer, Grace H. Cunningham, attributable to the improvements placed upon the property by the lessee.

The Commissioner of Internal Revenue, as petitioner herein, hereby designates the entire records of T.C. Docket Nos. 55090 and 55091, including this statement of points and designation, to be included in the printed record on appeal.

/s/ CHARLES K. RICE,
Assistant Attorney General.

[Endorsed]: Filed February 14, 1958, U.S.C.A.

No. 15815

United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

GRACE H. CUNNINGHAM, EUGENE F. CUNNINGHAM and
GRACE H. CUNNINGHAM, *Respondents.*

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

ANSWERING BRIEF OF RESPONDENTS

OGDEN & OGDEN

Attorneys for Respondents.

462 Olympic National Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

MAY 8 1938

PAUL P. O'BRIEN, CLERK

No. 15815

United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

GRACE H. CUNNINGHAM, EUGENE F. CUNNINGHAM and
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United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GRACE H. CUNNINGHAM, EUGENE F. CUN-
NINGHAM and GRACE H. CUNNINGHAM,
Respondents.

No. 15815

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

ANSWERING BRIEF OF RESPONDENTS

Come now the Respondents and for answer to the Brief of the Petitioner respectfully state as follows:

As set forth in the Brief for the Petitioner there are two causes of action, Docket 55091 and 55090, which were consolidated for hearing before the Tax Court and are now consolidated for hearing in this Court. The facts as respects the two cases are identical, except in 55090 the alleged deficiency of \$6,725.59 occurred in the tax return of Grace H. Cunningham in the year 1946, and in cause number 55091, the second alleged deficiency of \$9,528.54 occurred in the year 1952. Inasmuch as the claim for deficiency in the two tax returns are based upon identical facts they are admittedly inconsistent and recovery, if any, cannot be had on both.

AS RESPECTS THE QUESTION PRESENTED BY PETITIONER

The real question presented is: Did the cost of the improvements placed by the American Manufacturing Company, lessee, upon the real property of the Respondents, lessors, represent in whole or in part a liquidation in kind of lease rentals and therefore constitute taxable income to the Respondents? The Tax Court held the said improvements did not constitute rental and, therefore, the Respondents did not realize taxable income as the result of such improvements, either at the time of construction thereof or upon the termination of the lease. From this holding of the Tax Court, Petitioner has appealed.

The statutes involved are correctly stated by the Petitioner on Page 3 of his brief. The example shown on Pages 4 and 5 of Petitioner's brief appeared in Regulation 111, Internal Revenue Code, Sec. 29.22 (b) (11) -1. However, the last 16 lines thereof commencing with the word "If" do not again appear in any subsequent regulations.

STATEMENT

The Statement of Petitioner is in the main correct, although considerably curtailed.

The Respondents therefore desire to make an additional statement which may in some respects be repetitious.

Throughout this brief we will designate the American Manufacturing Company as "Company," except in cases of direct quotes.

From time to time throughout this brief we will direct the Court's attention to a colored map, facing page 7 hereof, which map sets forth in color the various property holdings, the various lots, owned by the Company and by the Respondents. It also shows the lots upon which the improvements were made, which map we hope will be of real assistance to the Court.

1. In 1928 Grace H. Cunningham began the manufacture of heavy steel machinery and equipment at the present location of the Company's plant (R. 125). In 1936 the Company was incorporated, occupying the same property that Grace H. Cunningham had theretofore been using.

2. From 1928 on through to 1944 Grace H. Cunningham, and later the Company, occupied Lots 7 to 12 in Block 2102, as shown in said map (R. 94, 130). During this period of time the Respondents and the Company filled these lots so that they became usable in their entirety (R. 64, Para. 20, 21). During this period of time neither Grace H. Cunningham nor the Company ever paid any rental or taxes on said lots, with the exception of \$10.00 a month for a few months in 1943 (R. 59, 64, Para. 22).

3. In 1943 the Company erected an open craneway on Lot 9 for use in moving heavy equipment and machinery (R. 32).

4. In 1944 the Company was in need of additional space for their plant, but were not financially able at that time to purchase Lots 7 to 12, as shown on the map (R. 129, 132).

5. In October of 1944 Grace H. Cunningham purchased Lots 7 to 12 for \$8,000.00 (R. 59). The purchase was made for the sole use and benefit of the Company so that the plant could be enlarged (R. 95, 129). If the Company could not find space at their present location to enlarge its plant, it would have been necessary for the Company to move (R. 95, 126).

6. Immediately following the purchase of these lots by Grace H. Cunningham in October, 1944, the Company placed a roof over the craneway on Lot 9 (R. 128) and closed in the south side with large glass windows and hollow cement tile at a cost of \$2,800.00 (R. 33, 36, 65).

7. In 1945 Eugene F. Cunningham, who owned Lots 4, 5 and 6, commenced building a warehouse known as the Graybar Building, on Lots 4, 5 and 6, but found himself in need of additional space and purchased from Grace H. Cunningham Lot 7 (R. 33, 106).

8. In November and December of 1945 Eugene F. Cunningham built the wall running between Lots 7 and 8, which wall constituted the south wall of the Graybar Building and the north wall of the improvement being built by the Company on Lot 8 (See map) (R. 141). This wall was constructed as a party wall, owned half by Eugene F. Cunningham and owned half by the Company and Grace H. Cunningham (R. 140, 141).

9. By the end of 1945 the alley between Blocks 2103 and 2102 had been filled and surfaced (see map) at a cost to the Company of \$2,755.00 (R. 36, 62, 63, 65). The cost of the party wall was \$4,734.00 (R. 37, 62, 65). The cost of the improvements on Lots 8 and 9 were \$2,800.00

(R. 36, 65). These funds were all spent in the year 1945 (see map) (R. 65, Para. 23).

10. On or about the last week in December of 1945 an oral agreement was entered into between Grace H. Cunningham, as owner of Lots 8 to 12, inclusive, and the Company, whereby it was agreed that Grace H. Cunningham would lease to the Company these lots for a period of six years. The Company agreed to pay all taxes and insurance, all costs of upkeep, and at the end of the six-year period to transfer to Grace H. Cunningham all improvements placed upon the property, either before the date of the oral agreement or subsequent thereto. The Company was to pay no rent (R. 129, 130, 132).

11. Subsequent to the oral agreement and in the first two months of 1946, the Company spent \$11,097.00 in completing the improvements (R. 36, 65, 132). This gave the Company an enclosed structure 50 feet x 120 feet with a craneway on both Lots 8 and 9.

12. On the 17th day of March, 1947, a written lease was entered into between Grace H. Cunningham as lessor and the Company as lessee (Ex. 1-A, R. 67-70).

13. On the 29th day of March, 1946, a written party wall agreement was entered into (Ex. 3-C, R. 73) although the party wall itself had been built under an oral agreement in November and December of 1945 (R. 140, 141) which was not reduced to writing until the 29th day of March, 1946 (R. 73, 74, 75).

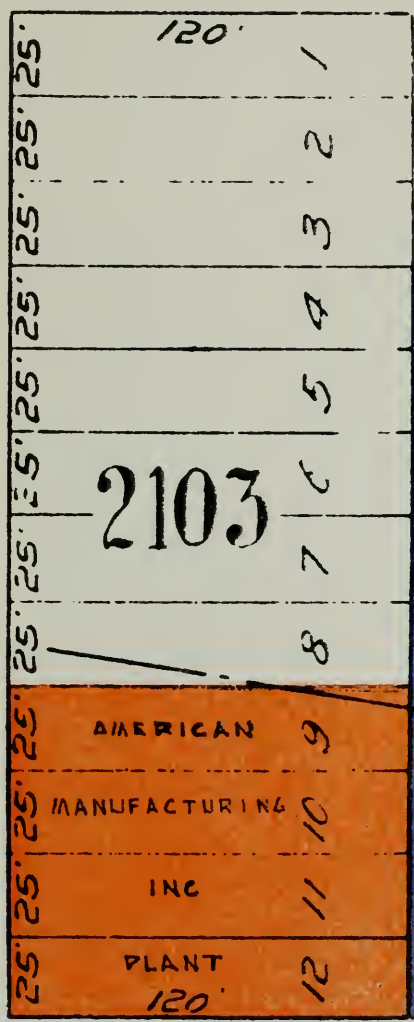
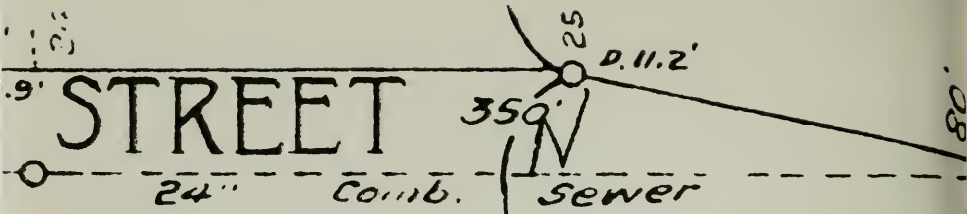
14. Respondents testified that the life of the improvement would not exceed 20 years (R. 108). By the

time the present lease expires in 1962, the building will be obsolete and will have to be torn down and a new type of building put up (R. 136). That the improvements erected by the lessee were of a special type, adapted to the Company's special use in the type of manufacturing in which they were engaged. That the building is one story and very high and would have no use to anyone unless they were engaged in the same type of manufacturing, and that there was no one in the City of Tacoma engaged in that business (R. 108, 109, 136, 137).

15. Grace H. Cunningham testified that as an owner of the real property, if she were not connected with the Company, or if she should sever her connections with the Company, she would want an agreement that the Company would remove these buildings and improvements so placed upon the realty at the expiration of the present lease in 1962. She stated that the improvements that had been placed upon the realty did not add any value whatsoever to the realty, this because of the nature and character of the building (R. 136, 137, 138).

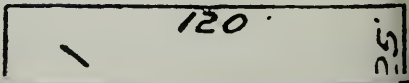
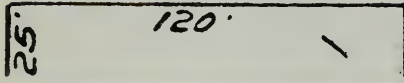
16. Grace H. Cunningham testified that she carried no insurance on the building, and that the insurance policy carried on the building by the Company did not include any personal protection for her. She did not believe the building was of any value to herself as a property owner (R. 140, 141).

17. On the 14th day of January, 1952, the written lease of March 17, 1947, having expired by its terms, a new written lease was entered into (Ex. 4-D, R. 76, 77). Under the terms of which lease Lots 8 and 9 and the East 40 feet of Lot 10 were leased to the Company for a



LEGEND

- RED IMPROVEMENTS PRIOR TO 1946
- GREEN IMPROVEMENTS AFTER 1946
- ORANGE AMERICAN MANUFACTURING, INC., PROPERTY
- BLUE IMPROVEMENTS ON ALLEY PRIOR TO 1946
- YELLOW PROPERTY NOT CONNECTED WITH THIS LITIGATION



22 ND.

32'
350'
350'
7.0'

period of ten years at the rental of \$10 per month plus taxes and insurance. These were the lots upon which the improvements were situated. Any improvements placed on the realty during said period to revert to the lessors at the end of the period. A more complete statement of facts is found in the Opinion of the Tax Court (R. 29-44) and in the stipulated facts (R. 55-67).

**AS RESPECTS PETITIONER'S STATEMENT OF
POINTS URGED IN 55091**

As respects point number 1, this point involves the findings of fact of the Tax Court. If the Petitioner would accept as true the findings of the Tax Court, then there could be no error "as a matter of law." Petitioner does not even allege that there would be. He takes the position that the Tax Court's findings are incorrect and supplements his own therefor, and on such supplemented statement of facts the alleged error of point 1 is based.

Point 2 involves in its entirety a challenge of correctness as to the facts found by the Tax Court.

Point 3 alleges error on the part of the Tax Court in failing to find the amount of income received in 1952 by taxpayers Eugene F. Cunningham and Grace H. Cunningham attributable to the improvements placed upon the property by the lessee. Inasmuch as the Tax Court found that there was no income received in 1952 by taxpayers which was attributable to improvements placed upon the property by the lessee, there was no occasion to go into the question of the amount of the income, they having found there was none. The question raised in Point 3 is moot.

**AS RESPECTS PETITIONER'S STATEMENT OF
POINTS URGED IN 55090**

They are identical with the points urged in Cause 55091, except 1946 is substituted for 1952, and our answer is the same.

Before proceeding further, we desire to call the Court's attention to the well-established rule which now prevails in all the Circuit Courts with respect to the rights and powers of the Circuit Courts in matters of appeal from decisions of the Tax Courts.

It was said in *Helvering v. National Grocery Co.*, 304 U.S. 282 at 294, 82 L.ed. 1346 at 1356:

“The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial de novo, in effect, an independent determination of the matters which had been in issue before the Board. The Court was without power to do so. *Helvering v. Rankin*, 295 U.S. 123, 131, 132, 79 L.ed. 1343, 1349, 1350, 55 S.Ct. 732. To draw inferences, to weigh the evidence and to declare the result was the function of the Board. *Hulburd v. Commissioner of Internal Revenue*, 296 U.S. 300, 306, 80 L.ed. 242, 246, 56 S.Ct. 197; *Elmhurst Cemetery Co. v. Commissioner of Internal Revenue*, 300 U.S. 37, 40, 81 L.ed. 491, 492, 57 S.Ct. 324.”

Perhaps no Circuit has been more zealous in following this rule than our own Ninth Circuit.

Grace Bros. v. Commissioner of Internal Revenue, 173 F.2d 170 at 173, 9th C.C.A. Feb. 18, 1949:

“By recent statutory enactment, Internal Revenue Code, Section 1141(a), as amended by Sec-

tion 36, Public Law 773, 80th Congress, Second Session, 26 U.S.C.A. §1141(a), it is decreed that this Court's jurisdiction to review shall be 'in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.' This reads into the Internal Revenue Code the provision of the Federal Rules of Civil Procedure that:

“ ‘Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’ Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.”

Joe Balestrieri & Co. v. Commissioner of Internal Rev., 177 F.2d 867 at 873, 9th C.C.A. Nov. 15, 1949:

“In our consideration of the questions of law presented on the merits we have taken the facts to be as found by the Tax Court for the reason that upon consideration of the entire record it appears to us that the court's findings are supported by substantial evidence and are not clearly erroneous.”

Particelli v. Commissioner of Internal Revenue, 212 F.2d 498 at 500, 9th C.C.A. May 5, 1954:

“[3, 4] The determination of whether the written contract reflected the real agreement between the parties was a question of fact and the Tax Court's finding with respect thereto is final if based upon substantial evidence. *Commissioner of Internal Revenue v. Tower*, 1946, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670. We find substantial evidence in this case to support the Tax Court's conclusion that the substance of the transaction was a sale of the wine and winery for a total price of \$350,000 without any bona fide agreement as to the real sales price of each piece of property involved.”

Accord:

E. L. Bride, et al., v. Commissioner of Internal Revenue, 224 F.2d 39 at 42 [1], 8th C.C.A. Aug. 1, 1955;

Alice E. Cohn, et al., v. Commissioner of Internal Revenue, 226 F.2d 22, 9th C.C.A. Oct. 1, 1955;

Golden Construction Co. v. Commissioner of Internal Revenue, 228 F.2d 637, 10th C.C.A. Dec. 24, 1955.

David Pleason v. Commissioner of Internal Revenue, 7th C.C.A. Nov. 2, 1955, 226 F.2d 732 at 733:

“[1] Petitioner, sometimes spoken of herein as taxpayer, seeks to set aside the decision of the Tax Court of the United States establishing certain deficiencies in income and victory taxes for the year 1943, in income tax for the year 1944 and penalties for those years. The findings of fact and the opinion of the court are reported in 22 T.C. 361. Inasmuch as it is the function of the trial court to weigh the evidence, draw inferences and declare the result, *Matthiessen v. Commissioner*, 2 Cir., 194 F.2d 659; *Burford-Toothaker Tractor Co. v. Commissioner*, 5 Cir., 192 F.2d 633, certiorari denied 343 U.S. 941, 72 S.Ct. 1033, 96 L.ed.1 347, our only function is to determine whether the findings are clearly erroneous, that is whether upon the whole record, there is substantial evidence to support them and whether the court erred as to the law. Inasmuch as the findings have been fully reported, we shall not repeat them. However, we have scrupulously examined the record, and are convinced that they are amply supported by the evidence and that the inferences drawn by the Tax Court are entirely reasonable.”

Such being the law, we shall endeavor to show this Court that the Findings of Fact of the Tax Court, as well as its ultimate decision, are fully supported by the evidence and surrounding circumstances, and that the facts as found by the Tax Court leave no room for errors of law.

REFERENCE TO PETITIONER'S SUMMARY OF ARGUMENT

Of necessity, Respondents' Order of argument will have to follow closely the order of the Petitioner's argument. It is Respondents' position that fundamentally there is but one question which in itself is determinative of this appeal.

Two statutes are involved; the first is now Section 109 of the 1954 Code. It reads as follows:

“§109. Improvements by lessee on lessor's property. Gross income does not include income (other than rent) derived by a lessor of real property on the termination of a lease, representing the value of such property attributable to buildings erected or other improvements made by the lessee. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 33.”

Also the section now known as 1019 of the 1954 Code, which reads as follows:

“§1019. Property on which lessee has made improvements. Neither the basis nor the adjusted basis of any portion of real property shall, in the case of the lessor of such property, be increased or diminished on account of income derived by the lessor in respect of such property and excludable from gross income under section 109 (relating to improvements by lessee on lessor's property). If

an amount representing any part of the value of real property attributable to buildings erected or other improvements made by a lessee in respect of such property was included in gross income of the lessor for any taxable year beginning before January 1, 1942, the basis of each portion of such property shall be properly adjusted for the amount so included in gross income. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 301.”

The question is: Did the facts in this case disclose that the building and improvements placed upon the leased property by the lessee company represent in whole or in part a liquidation in kind of lease rentals? The Tax Court answered the question as follows (R. 53):

“We are satisfied from this testimony and from the acts of the parties to the lease that they did not intend that the value of the improvements should constitute rent either at the time of construction or at the termination of the lease. We have therefore concluded and found as a fact that the value of such improvements made by the lessee did not represent rent at the time of construction or upon termination of the lease. It follows that the petitioners did not derive income attributable to such improvements either in 1946 or in 1952.”

ANSWER TO SUBDIVISION A OF PETITIONER'S BRIEF

We now consider Petitioner's argument under his heading “A. The law.” Under this section of his brief the Petitioner is seeking a new and weird construction of the 1942 Amendment, which is now Section 109 (1954 Tax Code). Here it is argued that the amendment should be so construed as to limit its intent to so-called

windfalls, *i.e.*, cancellation of leases. He argues that the word "termination" in the Act should be so construed as to mean "cancellation of a lease."

The Commissioner herein seeks to inject into this case for the first time a theory not even suggested in any of the various hearings that lead up to the trial in the Tax Court, nor was the slightest suggestion made in the Tax Court as to such a position. In fact, on page 13 of the Commissioner's brief in the Tax Court it is stated in reference to the 1942 amendment:

"It is apparent that Congress specifically intended to eliminate the application of the *Bruun* case, as the section applies exclusively to the year of termination of the lease."

Again on page 14 of the Commissioner's brief before the Tax Court, it is stated referring to the minutes of December 15, 1945:

"This language indicates that the erection of the improvements was the substitute for, or in lieu of, a regular periodic cash rental."

It was the position of the Commissioner before the Tax Court that the cost of the improvements placed upon the leased premises constituted a liquidation in kind of lease rentals.

The conclusion reached by the Petitioner in his brief here on page 23 is:

"Thus, it is clear that the 1942 statutory amendment did not have any application to income representing a liquidation in kind of lease rentals attributable to improvements erected by a lessee, but was enacted to prevent the taxation of income which represented a windfall from cancellation of

a lease. Thus, the question presented here is whether the enhanced value attributable to the improvements constitutes rent.”

This Court in *Lewis v. Pope Estate Co.*, 116 F.2d 328, 330, 9th C.C.A., Dec. 17, 1940, states:

“In both of those cases title to the improvements passed to the lessors upon completion of the construction, and there would be no reason for the reversals if such distinction controlled. We are therefore of the opinion that the time when title to the improvements passes to the lessor is immaterial, and that the real question is when the lessor ‘realizes’ income; . . . ”

The 1942 amendment was passed for the purpose of excluding from gross income any income derived by a lessor of real property on the termination of the lease, representing the value of such property attributable to buildings erected or other improvements made by the lessee, unless the same represents in whole or in part liquidation in kind of lease rentals.

The contention of the Petitioner is best answered by Treasury Regulations 111, Section 29.22 (b) (11) -1, being Regulation 1.109-1 of Federal Tax Regulations of 1958. Here the following language is used:

“Exclusion from Gross Income of Lessor of Real Property of Value of Improvements Erected by Lessee. Income derived by a lessor of real property *upon the termination, through forfeiture or otherwise*, of the lease of such property and attributable to buildings erected or other improvements made by the lessee upon the leased property is excluded from gross income.” (Emphasis ours)

Surely this portion of the Treasury Regulation is

diametrically opposed to the conclusion reached by the Petitioner in his brief on page 23. Again the wording of the regulation is:

“However, where the facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals, the exclusion from gross income shall not apply to the extent that such buildings or improvements represent such liquidation.”

Again this statement in the Treasury Regulation is diametrically opposed to the conclusion in Petitioner’s brief under its heading “A. The law,” as set forth on page 23.

Section 109 contains but five lines, it states:

“Gross income does not include income (other than rent) derived by a lessor of real property on the *termination of a lease*, representing the value of such property attributable to buildings erected or other improvements made by the lessee.” (Emphasis ours)

Every Regulation since the passage of the Act reads as follows:

“Income derived by a lessor of real property upon the *termination*, through forfeiture or otherwise, of the lease of such property and attributable to buildings erected or other improvements made by the lessee upon leased property is excluded from gross income.” (Emphasis ours)

This Act has been in force since 1942. So far as shown in Shepard’s, the Act has only been referred to twice, once in the case of *Beck v. F. W. Woolworth Co.*, 111 F.Supp. 824, where on page 830 the Court speaks as follows:

“It might be noted that formerly it was held that the value of an improvement erected by the lessee, and not removable by him, was income to the lessor for federal income tax purposes when the lease terminated. *Helvering v. Bruun*, 1940, 309 U.S. 461, 60 S.Ct. 631, 84 L.ed. 864. But now the statute provides the contrary. Internal Revenue Code, §22 (b) (11), 26 U.S.C.A. 1 American Law of Property, §3.77 (1952).”

And again in *First National Bank of Kansas City v. Nee*, 190 F.2d 61, where on page 68 the Court speaks as follows, referring to the rule in *Helvering v. Bruun*, 309 U.S. 461, 60 S.Ct. 631, 84 L.ed. 864, relating to:

“ . . . the cancellation of a long-term lease and the return to the lessor’s devisees of the leased premises together with a valuable building erected by the lessee.”

Here appears a note at the bottom of the page, the note reads:

“Parenthetically, a problem which would not occur at this time, since intervening legislation has eliminated the taxability of such a situation.”

This Court has in times past had a great deal of experience with this particular problem which had vexed all our Federal Courts for a period of 40 years or more, namely: the disposition to be made, taxwise, of buildings or other improvements placed upon leased premises by the lessor, which, under the terms of the lease, revert to the lessor, either at the termination of the term of lease or its earlier termination by forfeiture or otherwise. There was little unanimity of opinion among the various Circuit Courts.

By the amendment of 1942 (109 of 1954 Tax Code), it was the intent of the Congress to put an end once and for all to this vexatious problem and to make it clear that whenever the lessor came into possession of buildings erected by the lessee upon leased property that the same would not constitute gross income, and therefore the same should be excluded from gross income excepting only when the improvements constituted a liquidation in kind of lease rental. The result of this Act was not to relieve the lessor from the payment of any tax if he actually received value flowing from such reversion. Accordingly, Section 113 (c) of the 1939 Code was amended in 1942 (See Section 1019 of the 1954 Tax Code). This amendment provided that neither the basis nor the adjusted basis of any portion of real property shall, in the case of the lessor of such property, be increased or diminished on account of income derived by the lessor in respect of such property and excluded from gross income of Section 109 (relating to improvements by lessee on lessor's property).

It is clearly the intent of the Petitioner in this appeal to seek a decision from this Court limiting the exemption from gross income contained in Section 109 by construing the word "termination" therein used to mean "cancellation of a lease," this he designates as "windfalls." If his position should be sustained, it would bring back on the taxrolls property measured not in thousands, but in millions of dollars. Such a conclusion would defeat the very purpose of the Act and would again leave open the very vexatious problems the Act was intended to solve. It is not believed that this

Court will give heed or credence to this alleged strained and impossible construction of said Section 109 (being the 1942 amendment so frequently referred to).

As respects Subdivision "A. The law" of Petitioner's brief, this whole section must be entirely disregarded for the reason that this section injects into this case a new theory not heretofore presented to the Tax Court. As we have pointed out in the beginning of the discussion of "A. The law" the brief of the Commissioner in the hearing before the Tax Court distinctly relied upon the theory that the improvements placed by the lessee on property of the lessor, Respondents here, represented in whole a liquidation in kind of lease rental. Therefore, the exclusion from gross income did not apply.

It is the law that on appeal the appellant, herein designated Petitioner, must adhere to the theory on which the case is tried in the lower Court. See *Kirk v. St. Joseph Stockyards Co.*, 206 F.2d 283 at 287, 40 A.L.R.2d 980, 8 Cir. 1953, where it is said:

"It is elementary that on appeal the appellant must adhere to the theory on which the case was tried in the lower court. *Barnsdall Refining Corporation v. Cushman-Wilson Oil Co.*, 8 Cir., 97 F.2d 481; *Petersen v. Chicago, Great Western Ry. Co.*, 8 Cir., 138 F.2d 304; *Valley Shoe Corporation v. Stout*, 8 Cir., 98 F.2d 514; *Gulf, Mobile & Ohio R. Co. v. Williamson*, 8 Cir., 191 F.2d 887. In *Valley Shoe Corporation v. Stout*, supra, we said [98 F.2d 518]: 'Moreover, this Court, on appeal, must adhere to the theory upon which the case was tried in the lower court.' And in *Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.*, supra, we said [97 F.2d

485]: 'We must, on appeal, adhere to the theory on which the case was tried in the lower court.' Any other practice would be manifestly unfair to an appellee and to the trial judge.'

It is not believed this Court will accept the strained construction sought by the Petitioner.

ANSWER TO SUBDIVISION B OF PETITIONER'S BRIEF

Here the Petitioner is challenging the correctness of certain findings of the Tax Court. Petitioner states on page 23 of his brief, as follows:

"The Tax Court concluded (R. 53) that the parties to the lease 'did not intend that the value of the improvements should constitute rent' and concluded 'that the value of such improvements made by the lessee did not represent rent' based upon its findings that the parties did not so intend. We submit that the Tax Court erred as a matter of law in reaching this conclusion."

The facts are that the improvements made in 1945 were made merely by consent of Respondents; those in 1946 were made under an oral agreement, sometimes designated as "oral lease." The terms and conditions of such oral lease were testified to by both Respondents.

It is true that on the 15th day of December, 1945, at a meeting of the Board of Directors of the Company, it was announced that Grace H. Cunningham was willing to lease to the Company, *free of any rent* except payment of taxes, Lots 8 to 12 in Block 2102 of Tacoma Land Company's 5th Addition to Tacoma, Pierce County, Washington. This said property (see map) was stra-

tegitically situated and would make an ideal building site for the Company's needed improvements. The minutes of said meeting of the Directors did not constitute the oral lease. Throughout Petitioner's brief, reference is frequently made to the minutes of this meeting of December 15th as though the same constituted the oral lease, which, of course, is not the fact.

It is the testimony of Respondents that the oral lease positively provided that there should be no rental of any kind paid by the Company for the use of said Lots 8 to 12, inclusive, excepting payment of taxes, this for the following reasons:

1. The Company had been using these lots for many years without rent.

2. The Company had transformed the lots from an unusable physical condition to level usable condition, by filling in parts of the lots that were 40 feet below grade.

3. In 1944 Grace H. Cunningham purchased these lots specifically for the continued use of the Company, without rent, just as they had always been.

Grace H. Cunningham testified as follows (R. 129):

“Q. Will you state to the Court why you bought these lots?”

A. I bought them so that my company, the American Manufacturing Company, had working space. They couldn't afford to [54] buy them themselves.” . . .

“Q. (By MR. OGDEN) At this time in 1945, the latter part thereof, was there any negotiations entered into between the American Manufacturing

Company and yourself respecting these lots in question, the five lots?

A. They were to use the five lots for nothing, provided they paid the taxes, any improvements that they put on them were not to be of any cost to me. They had been using them since 1928 and they wanted to continue on using them.

Q. Was there at the time of this arrangement, namely, the agreement you refer to of the last part of 1945, was there an oral agreement covering what they might do with these lots?

A. Yes.

Q. Now, state to the Court what that oral agreement was?

A. The oral agreement was that they were to, that they could erect an addition to the present craneway.

Q. That would cover what lot?

A. Lot No. 8:

Q. And what was on the other side of Lot No. 8?

A. The Graybar Building. [55]

Q. Lot No. 8 was 25 feet in width the same as 9?

A. Correct, by 120 feet long.

Q. State to the Court whether or not there was any intent on the part of yourself as owner of these five lots and the American Manufacturing Company relative to rent?"

Following this question, there was an objection made by Mr. Welch, a colloquy between the Court, the witness Grace H. Cunningham, and Mr. Ogden ensued. At the close of which colloquy the objection was overruled and the witness instructed to answer (R. 132).

"A. I had no intent of rent. I was only concerned

with acquiring additional space for my company so that they could exist in that location.

“Q. (By MR. OGDEN) Do you know whether or not the American Manufacturing Company, after January 1, 1946, did place any improvements on this property?

A. They placed a 25 by 120-foot structure, a roof, a floor, and two ends which adjoined the Graybar Building.

Q. The stipulation entered into and now on file states that the cost of this improvement to which you have just testified was \$11,094?

A. Correct.

Q. Does \$11,094 represent the amount paid by the American Manufacturing Company for these improvements?

A. That is right. [58]

MR. OGDEN: I am going to ask this exactly in the wording of the Commissioner in his letter.

Q. (By MR. OGDEN) Were these the improvements that were to revert to you under the terms of the lease on the first day of January, 1952?

A. Yes, correct.” (R. 133) (See also Eugene F. Cunningham, R. 97, 98)

The foregoing constitutes the testimony relative to the terms of the oral agreement, or lease, so far as the same related to rental.

Sec. 12 of the Stipulation of Facts (R. 61) reads as follows:

“Grace H. Cunningham, being the largest stockholder and manager of said American Manufacturing Company, was desirous of permitting the company to expand its business and obtain the then

necessary room by changing the craneway into a complete structure.”

On March 17, 1947, over a year after the improvement placed by the Company on the lots in question had been completed, a written lease was executed (R. 67), reading in part as follows (R. 68) :

“The consideration for said lease being that the lessee will pay taxes on the above-described property for a period of six years and will transfer, at the end of the period of the lease, all right, title and interest which said lessee *has* in a building which lessee *has* constructed and *paid for* on the above-described property.” (R. 35, 67) (Emphasis ours)

On page 24 of his brief Petitioner states :

“However, where, as here, the sole specified consideration for occupancy (except the payment of taxes) is ‘construction of a building on said premises of the approximately value of \$25,000.00’ . . . ”

Such are not the facts, either under the oral lease of January 2, 1946, or under the written lease of March 17, 1947. The only place where the words “construction of a building on said premises of the approximate value of \$25,000.00” is found is in the minutes of the meeting of December 15, 1945. Recitals in the minutes of a meeting of a Board of Directors of a corporation do not constitute a contract, nor do they constitute a lease, oral or written.

The only two leases that can possibly affect the facts in this case are the oral lease of January 2, 1946, and the written lease of March 17, 1947, in neither of which leases was the “sole” consideration for the granting of the lease the right of reversion to the lessor of the im-

provements placed upon the leased premises by the lessee.

As heretofore pointed out, Grace H. Cunningham testified there was to be no rent; the minutes of December 15, 1945, also declare that there shall be no rent; that the payment of rent was not the consideration; that the true consideration for the lease was the erection of buildings and improvements on the leased premises which would permit the Company to continue its manufacturing business without the necessity of moving from their then plant location (R. 126).

Petitioner does not cite one single case which holds that oral testimony is not permissible in proving the terms of an oral lease. How else could it be proven? It must be remembered that it was under this oral lease that these improvements were constructed.

Great strength is added to the testimony of the Respondents by the treatment given this matter in the Company's books. There it is disclosed that the total cost of the improvements, in the sum of \$21,904.33, was capitalized. This capitalized amount was then by the Company depreciated over the period of the lease (R. 66, Para. 29).

It is clear that the value of the improvements placed upon the leased premises cannot be capital to the lessee, and at the same time rental to the lessor.

It is respectfully submitted that no stronger evidence of the intent of the parties could be found than in the method in which each treated the cost of the improvements placed upon the property, both before and after January 1, 1946 (R. 66, Para. 29).

Petitioner states on page 23 that the conclusion of the Tax Court that the parties "did not intend that the value of the improvements should constitute rent," was reversible error.

It is difficult for us to find in the whole of Subdivision B of Petitioner's brief the reason why he asserts that this conclusion of the Tax Court was erroneous.

Certain it is that in his citation of supporting authorities his first citation of *M. E. Blatt Co. v. United States*, 305 U.S. 267, 83 L.ed. 167, can afford him no basis for the conclusion reached under Subdivision B. In the *Blatt* case the Court on page 170 of 83 L.ed., 277 of 305 U.S., defines what does or does not constitute rent, as applied to improvements placed upon leased premises by lessee:

"There is nothing in the findings to suggest that cost of any improvement made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. While the lease required it to make improvements necessary for successful operation, no item was specified, nor the time or amount of any expenditure. The requirement was one making for success of the business to be done on the leased premises. It well may have been deemed by lessor essential or appropriate to secure payment of the rent stipulated in the lease. Even when required, improvements by lessee will not be deemed rent unless *intention that they shall be is plainly disclosed*. Rent is 'a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property . . . ; . . . it does not include payments, uncertain both as to amount and time, made for the cost of improvements. . . .' The facts

found are clearly not sufficient to sustain the lower court's holding to the effect that the making of improvements by lessee was payment of rent." (Emphasis ours)

Here the Supreme Court of the United States states unequivocally that improvements placed by the lessee on lessors' lands will not be deemed rent *unless the intention so to do is clearly disclosed*, and yet this very case is cited by the Petitioner as authority for holding that the Tax Court committed error in permitting evidence to be introduced to show the intent of the parties.

Again in *Duffy v. Central R. Co.*, 268 U.S. 55 at 62, 69 L.ed. 846 at 848, cited by Petitioners, the Court states:

"Clearly, the expenditures were not 'expenses paid within the year in the maintenance and operation of its [respondent's] business and properties;' but were for additions and betterments of a permanent character, such as would, if made by an owner, come within the proviso in subd. second, 'that no deduction shall be allowed' for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property, etc.' They were made, not to keep the properties going, but to create additions to them. They constituted, not *upkeep*, but *investment*; not maintenance or operating expenses, deductible under subd. first, §12 (a), but capital, subject to annual allowances for exhaustion or depreciation under subd. second.

"Nevertheless, do such expenditures come within the words 'rentals or other payments required to be made as a condition to the continued use or possession of property'? We think not. The statement

of the court below that it was conceded by both parties that the expenditures were 'additional rentals' is challenged by the government, and does not seem to have support in the record. The term 'rentals,' since there is nothing to indicate the contrary, must be taken in its usual and ordinary sense; that is, as implying a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property (*Dodge v. Hogan*, 19 R.I. 4, 11, 31 Atl. 268, 1059; 2 Washb. Real Prop. 6th ed. §1187); and in that sense it does not include payments, uncertain both as to amount and time, made for the cost of improvements, or even for taxes (*Guild v. Sampson*, 232 Mass. 509, 513, 122 N.E. 712; *Garner v. Hannah*, 6 Duer, 262, 266, 267; *Bien v. Bixby*, 18 Misc. 415, 41 N.Y.Supp. 435; *Simonelli v. DiErrico*, 59 Misc. 485, 110 N.Y.Supp. 1045). Expenditures, therefore, like those here involved, made for betterments and additions to leased premises, cannot be deducted under the term 'rentals,' in the absence of circumstances fairly importing an exceptional meaning; and these we do not find in respect of the statute under review."

Accord: *Logan Coal & Timber Ass'n. v. Helvering*, 122 F.2d 848 at 850. Also, definition of "rent" found in the ruling of the Income Tax Unit of the Treasury Department, reading as follows:

"The term 'rents' must be taken in its usual and ordinary sense, that is, as applying to a fixed sum to be paid at stated times for the use of property (citing cases)."

This ruling is I.T. 2970 C.B. XV-1, page 145, and is still in effect so far as we can ascertain. The above quotation is taken from the case of *Great Nat. Life Ins. Co. v. Campbell*, Oct. 30, 1953, 119 F.Supp. 57 at 60.

The facts found by the Tax Court that the parties to the lease did not intend that the value of improvements should constitute rent, and that the value of such improvements made by the lessee did not represent rent is amply sustained by the evidence, and, therefore, the position of the Tax Court must be sustained.

**ANSWER TO SUBDIVISION C OF PETITIONER'S
BRIEF, PAGE 25**

Here again we find it somewhat difficult to ascertain from Petitioner's brief just what facts contained in the decision of the Tax Court are alleged to be erroneous, and just why they are erroneous, unless it be the statement contained on Page 26, reading as follows:

“Even if it were correct for the Tax Court to have relied solely upon the intention of the parties, we submit that the finding that the parties did not intend the building to constitute rent is clearly erroneous.”

In our discussion of Subdivision C, we must rely upon the cases we have cited in answering Subdivision B. In that connection, we cited the holding of the Supreme Court in *Blatt v. U. S.*, and quoted at length from that decision wherein the Court held that the *intention* of the parties is controlling when deciding what is or is not rent attributable to buildings or improvements placed upon leased premises by the lessee. Unless such intent is clear and unmistakable, improvements or buildings so placed on leased property will not be considered as rent.

We have cited under Subdivision B the evidence which justified the Tax Court's finding that the parties

did not intend that the improvements should constitute rent, and concluded therefrom that the taxpayers did not derive income attributable to such improvements either in 1946 or in 1952. In this respect, Subdivision C is but a repetition of Subdivision B.

On page 26 of Petitioner's brief, the following statement is made:

“The Tax Court relied primarily (R. 52-53) upon the testimony of taxpayers that there was no intention to charge rent (R. 97-98, 132), and that the improvements did not have any value except for use by the corporation or by someone in a similar business (R. 104-105, 11-113, 134, 136-137). We submit that reliance upon this testimony is clearly erroneous.”

To justify this conclusion, the following statement is made:

“Since taxpayer was a signatory to the lease which stated that the reversion to her of the building was the consideration for the lease, her testimony to the contrary, directed at a change of the legal effect of a written instrument, should not be accorded any weight.”

If this statement was correct, there might conceivably be some merit in Petitioner's contention, but the statement is not correct. There was only one written lease that had any reference to the buildings and improvements placed upon the leased property by the lessee, and that was the lease of March 17, 1947. This lease was not drawn until more than one year after the completion of the improvements and occupation of the same by the Company. It had no reference whatsoever to the terms

and conditions of the oral agreement under which the improvements, placed upon the property in 1946, were made.

The following recital is contained in this lease of March 17, 1947:

“The consideration for said lease being that the lessee will pay taxes on the above-described property for a period of six years and will transfer, at the end of the period of the lease, all right, title and interest which said lessee *has* in a building which lessee *has* constructed *and paid for* on the above-described property.” (Emphasis ours) (R. 67-68)

It will further be observed that this written lease refers to a building that had theretofore been constructed and paid for by the lessee. This lease is not the agreement under which the improvements were placed upon the property, nor does it purport to have anything to do with it. It relates to a building that has been built and paid for. The reason for this lease is that under the laws of the State of Washington, an oral lease is not valid beyond one year from the date thereof (R.C.W. 59.04.010). And, for the additional reason that the Supreme Court of the State of Washington has held that:

“ . . . whether or not property annexed to the freehold becomes a part of the realty depends upon the intention of the party making the annexation.” *Forman v. Columbia Theater Co.*, 20 Wn.(2d) 685 at 694 (4 & 5), 148 P.(2d) 951.

For these reasons it was necessary that a written lease be drawn to protect the rights of parties during the balance of the 6-year term of the lease.

It is submitted that the Tax Court was correct in

holding that the proof of whether or not the improvements were to be considered as rent depended upon the intention of the parties at the time these improvements were placed on the realty.

The Tax Court found that at that time there was no intent on the part of either party that any rent should be charged or considered, and that the true consideration for permitting the Company, as lessee, to place improvements upon the property of the Respondents was, as stated by the Tax Court, to make it possible for the Company to continue its uninterrupted use of these five lots for the advancement and expansion of its business.

It will be observed that the provisions of the written lease just quoted do not say that the transfer or reversion of the improvements was *the* consideration for the lease. The most that can be said is that under the terms of the written lease the right of reversion constituted some measure of consideration, providing the improvements at time of reversion should be of any value.

Grace H. Cunningham testified that they would have no such value, and by the end of the present lease in 1962 the buildings would have to be torn down because of being no longer useful.

The writer of this brief has drawn many long-term leases. In all of which provision was made requiring the lessee to place upon the leased premises buildings which would, under the terms of the lease, revert to the lessor, the cost of these buildings oft-times running into many thousands of dollars.

It is believed that this Court will take judicial notice of the fact that under a lease which provides for im-

provements to be placed on the realty with right of reversion to the lessor, that such a provision does constitute one of the considerations for the lease. Nor does such a finding of consideration bar the lessor from the protection of the 1942 amendment (1954 Tax Code) as to exclusion from gross income of the value of the building or improvements. Nor does the fact that such a provision constitutes one of the considerations for the lease, cause the cost of the building or improvements to be classified as rental and taxable as such.

Again on page 27, the Petitioner continues to carry forward the incorrect statements to which attention has just been directed.

Considering now the remaining argument of the Petitioner, the materiality or pertinence of all of the remaining argument under Subdivision C is based upon the assumption that the 1942 Amendment (Section 109, 1954 Tax Code) only exempted from gross income buildings and improvements reverting to the lessor by virtue of a cancelling of the lease, or as Petitioner terms it "windfalls."

Unless this Court is willing to accept and follow the suggested construction of the 1942 Act, then all the remaining argument under the paragraph becomes moot, wholly irrelevant and wholly immaterial. It is here asserted that because the buildings and improvements placed upon the leased premises by the Company reverted to the lessor at the termination of the lease, that, therefore, the buildings and improvements must be rent and are not exempt from gross income under the 1942 Amendment.

On page 28 a statement occurs which Petitioner must have known was incorrect. There it is stated:

“Thus, a corporation would be able to recoup its entire costs of the building over a few years, and at the end of the lease term its principal stockholder would receive a building having value at no cost to him and *free from tax.*” (Emphasis ours)

The Petitioner must have known that Section 1019 (1954 Tax Code) was amended in 1942 and was amended for the purpose of making any improvements placed upon the leased property and reverting to the lessor subject to a tax. If the improvements so received had value, the lessor would, whenever the property was sold, pay a tax based on the value of such buildings and improvements. Petitioner knew that the lessor could not receive such improvements free from tax if the improvements had actual value. If they had no value at the time of reversion, there would be no tax, even under Petitioner’s theory.

Again in the last paragraph on page 28 of Petitioner’s brief, it is said:

“Secondly, the taxpayers’ testimony and the Tax Court’s reliance upon the statement that the improvements lacked any value in the hands of taxpayers appears to be clearly wrong. The corporation continued to remain in business at the same place after the initial 6-year lease expired.”

The “taxpayers” never did testify that the improvements did not have value to the lessee. On the contrary, the Respondents testified that the buildings and improvements were of value to the lessee. What they did testify to was that the improvements placed upon the

leased property by the lessee constituted no additional element of value to the real property in the event the Company would cease to use them.

Grace H. Cunningham testified that if she were not interested in the Company itself, and interested in the growth of the Company and the necessity for room to expand, she, as an owner, would certainly require that the lessee at the termination of its lease remove all of the improvements from the real property (R. 134,137).

She further testified that the buildings were of a special type, built for a special purpose, and useful only to the Company for that special purpose. That the improvements could only be valuable to some other manufacturer engaged in the same type of business as the Company, and that there was no other such corporation, or individual, now operating such a business in the City of Tacoma (R. 136).

It will be noted in the above quotation that the Petitioners stated:

“. . . the Tax Court's reliance upon the statement that the improvements lacked any value in the hands of taxpayers appears to be clearly wrong.”

Then on page 29, the following statement occurs:

“The Tax Court made no findings that the building lacked value to the lessor. Indeed it assumed it had value.”

How can these two statements be reconciled? On which is error predicated?

We are unable to recognize the relevancy or materiality of the argument of the Petitioner on pages 29, 30, 31 and 32 of his brief, for the reason that the same do not

relate to facts, either found by the Tax Court or contained in the record. This is clearly shown by the statement at the foot of page 32 where Petitioner states:

“The facts of the present case, on the other hand, clearly show that the terms of the lease are that the lessee (R. 72) ‘would immediately commence construction of a building on said premises of the approximate value of \$25,000.00’; and that (R. 68, 71, 72) the consideration for the lease would be the transfer of all interest in the building at the termination of the lease to the lessor, after a 6-year period, a period much shorter than the life of the building.”

We have shown that there is no lease in existence containing the language attributed to it by the quoted statement. This the Petitioner must have known at the time the quoted statement was made. The only written lease in existence is the lease of March 17, 1947, and no such statement is made in that lease.

Again it would seem that these continuous incorrect statements were made for the purpose of confusing the Court. We can find no merit under the entire heading “Subdivision C.”

All the findings of the Tax Court herein complained of were and are abundantly supported by the evidence and records in this case.

ANSWER TO SUBDIVISIONS D AND E OF PETITIONER'S BRIEF

Unless this Court reverses the decision of the Tax Court, Petitioner's argument under both subdivisions D and E becomes wholly irrelevant.

At this juncture it might be well to view the situation as it exists in respect to certain facts of this case.

This whole matter started with the Agent who first conceived the idea that the improvements placed upon the leased premises represented in whole a liquidation in kind of lease rental, and, therefore, the exclusion from gross income did not apply. Petitioner, at that time, placed his reliance upon I.T. 4009-1950-1 C.B. 13 (R. 51). The facts on which this ruling was based were:

A owned a piece of land which had just come under an irrigation project. A leased this land to B, a farmer. The written lease provided that if B would clear, level, and properly prepare the land for irrigation, and would put in proper irrigation ditches, pipes and pumps necessary to make a complete irrigation system covering the whole land, then the cost of all such material, labor and improvements would be "*in lieu of rent*" for the full life of the lease.

The lease used the express language "*in lieu of rent.*" This, of course, brought A squarely under the wording of the "1942 amendment" and especially under Federal Tax Regulation 111, Section 29.22 (b) (11)-1, now 1.109-1 1958 Tax Regulations.

In the letters of deficiency issued by the Commissioner in Case Nos. 55090 and 55091, the cost of the improvements placed upon the leased premises in the taxable year 1946 was fixed as \$21,904.33. This item of cost was and is admittedly in error. The true cost of the improvements placed upon the leased premises in the taxable year of 1946 was \$11,097 (R. 36, 65, 132).

The cost of the improvements in the taxable year of 1946 constitutes the basis of all subsequent proceedings, including the case in the Tax Court and its appeal in this Court.

A reversal of the decision of the Tax Court would require a recomputation of both claimed deficiencies (R. 14, 25, 39, 40).

In the event this Court should hold that the cost of improvements so placed upon the premises in the tax year of 1946 would represent in whole or in part a liquidation in kind of lease rentals, it would require a determination of what constituted a fair rent of the premises upon which the improvements were placed. The testimony in this case shows that the only rent that had been paid since 1928 to 1952 on the lots in question was \$110.00, which constituted rent at the rate of \$10 per month for eleven months. This was in the latter part of 1944 to February, 1945 (R. 64, 126).

The evidence also shows that when the written lease of March 17, 1946, expired in 1952, the real property upon which the improvements in question were located was again leased to the Company for a period of ten years, the Company to pay the taxes, a monthly rental of \$10, insurance and cost of any improvements, which, if made, would revert to the lessor at the end of the 10-year period (R. 37, 76, 77).

The undisputed evidence also shows that these improvements placed by the lessee on the leased property would be obsolete by 1962 and would have to be torn down (R. 136).

The undisputed evidence of the lessor was that the improvements placed by the lessee upon the leased premises did not constitute any element of value to the lessor for the reason that the improvements were of a highly specialized nature, not adaptable for any other use than that of the Company, or some other company engaged in the same line of business, and that there was no other such company in the City of Tacoma (R. 134, 136, 137, 138).

When a determination has been made of the proper annual rental (which the Respondents assert would not be in excess of \$10 per month and tax payments) such an amount might then be found to be taxable gain to the lessor in each of the six years, being the life of the lease.

If, however, it should be determined that the improvement placed upon the leased premises by the lessee did not constitute any element of value to the lessor, then there could be no taxable gain, even if a fair rental basis was determined.

The whole matter now simmers down to but one proposition, and that is: Was it the intent of the parties, lessor and lessee, at the time of the placing of the improvements on the leased property by the lessee that the lessee should pay no rent other than taxes and insurance? The Tax Court found that such was the intent of the parties and concluded their opinion with the following statement (R. 53):

“We are satisfied from this testimony and from the acts of the parties to the lease that they did not intend that the value of the improvements should

constitute rent either at the time of construction or at the termination of the lease. We have therefore concluded and found as a fact that the value of such improvements made by the lessee did not represent rent at the time of construction or upon termination of the lease. It follows that the petitioners did not derive income attributable to such improvements either in 1946 or in 1952.”

CONCLUSION

It is respectfully submitted that Respondents have shown that the facts found by the Tax Court in this case are fully sustained by the evidence and surrounding circumstances, and, therefore, the decision of the Tax Court (R. 54) must be sustained.

Respectfully submitted,

OGDEN & OGDEN

Attorneys for Respondents.

462 Olympic National Building,
Seattle 4, Washington.

May, 1958.

No. 15815

**In the United States Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GRACE H. CUNNINGHAM, EUGENE F. CUNNINGHAM AND
GRACE H. CUNNINGHAM, RESPONDENTS

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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APR 14 1958

PAUL P. O'BRIEN, CLERK

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GRACE H. CUNNINGHAM, RESPONDENTS

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINION BELOW

The Tax Court's findings of fact and opinion (R. 29-53) are officially reported at 28 T. C. 670.

JURISDICTION

The petition for review in T. C. No. 55,090 (R. 147-151) involves federal income taxes for the taxable year 1946 with respect to taxpayer, Grace H. Cunningham. The petition for review in T. C. No. 55,091 (R. 151-155) involves federal income taxes for the taxable year 1952 with respect to taxpayers, Grace H. Cunningham and Eugene F. Cunningham. On August 25, 1954, the Commissioner mailed to taxpayer, Grace H. Cunningham, a notice of a defi-

ciency for the taxable year 1946 in the total amount of \$6,725.59. (R. 12-15.) On August 25, 1954, the Commissioner mailed to taxpayers, Grace H. Cunningham and Eugene F. Cunningham, a notice of deficiency for the taxable year 1952 in the total amount of \$9,528.54. (R. 23-26.) Within the ninety days thereafter and on October 22, 1954, taxpayers in both cases filed petitions with the Tax Court for redeterminations of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 5, 7-15, 18-26.) The decisions of the Tax Court were entered June 26, 1957. (R. 54-55.) These cases are brought to this Court by petitions for review filed September 16, 1957. (R. 147-155.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Taxpayer leased real property to a corporation of which she was a principal stockholder and financial backer. Under the terms of the lease the corporation was to make certain improvements upon the lots, pay the taxes on the property, and transfer all right, title and interest to the improvements to the lessor at the termination of the lease. The question presented is whether the enhanced value attributable to the improvements as of the date of reversion to the lessor constitutes rental income to the lessor; and, if so, whether such income was realized in 1946, the year the improvements were erected, or in 1952, the year in which they reverted to the taxpayer.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions From Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(11) [As added by Sec. 115 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Improvements by lessee on lessor's property.*—Income, other than rent, derived by a lessor of real property upon the termination of a lease, representing the value of such property attributable to buildings erected or other improvements made by the lessee.

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22 (b) (11)–1. *Exclusion From Gross Income of Lessor of Real Property of*

Value of Improvements Erected by Lessee.—Income derived by a lessor of real property upon the termination, through forfeiture or otherwise, of the lease of such property and attributable to buildings erected or other improvements made by the lessee upon the leased property is excluded from gross income. However, where the facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals, the exclusion from gross income shall not apply to the extent that such buildings or improvements represent such liquidation. The exclusion applies only with respect to the income realized by the lessor upon the termination of the lease and has no application to income, if any, in the form of rent, which may be derived by a lessor during the period of the lease and attributable to buildings erected or other improvements made by the lessee. It has no application to income which may be realized by the lessor upon the termination of the lease but not attributable to the value of such buildings or improvements. Neither does it apply to income derived by the lessor subsequent to the termination of the lease incident to the ownership of such buildings or improvements.

The provisions of this section may be illustrated by the following example:

Example. The A Corporation leased in 1935 for a period of 50 years unimproved real property to the B Corporation under a lease providing that the B Corporation erect on the leased premises an office building costing \$500,000, in addition to paying the A Corporation a lease rental of \$10,000 per annum beginning on the

date of completion of the improvements, the sum of \$100,000 being placed in escrow for the payment of the rental. The building was completed on January 1, 1937. The lease provided that all improvements made by the lessee on the leased property would become the absolute property of the A Corporation on the termination of the lease by forfeiture or otherwise and that the lessor would become entitled on such termination to the remainder of the sum, if any, remaining in the escrow fund. The B Corporation forfeited its lease on January 1, 1942, when the improvements had a value of \$100,000. Under the provisions of section 22 (b) (11), the \$100,000 is excluded from gross income. The amount of \$50,000 representing the remainder in the escrow fund is forfeited to the A Corporation and is included in the gross income of that taxpayer. If, in this example, the lease covered a period of only 25 years and the building upon completion had an estimated value of \$75,000 as of the end of the lease term and in accordance with an option granted by the regulations the A Corporation included in gross income the sum of \$3,000 for each taxable year from 1937 to 1941, both years inclusive, then there shall be excluded from gross income for the taxable year 1942 and subsequent taxable years any such amounts otherwise includible in gross income for such years and attributable to the building erected by the B Corporation, notwithstanding the exercise of such option. As to the basis of the property in the hands of the A Corporation, see section 29.113 (c)-1.

Sec. 39.22 (b) (11)-1 of Treasury Regulations 118 contains the same provisions.

STATEMENT

The relevant facts may be stated as follows:

Taxpayers, Grace H. Cunningham and Eugene F. Cunningham, are husband and wife. Grace H. Cunningham filed an individual income tax return for 1946. For 1952, she and her husband filed a joint return. (R. 30.)

In 1928, Grace H. Cunningham started a steel manufacturing enterprise which was incorporated in 1936 as the American Manufacturing Company, Inc. She has been one of the principal owners of its stock and its general manager and financial backer. Her brother has been its president and executive head, and her husband, Eugene F. Cunningham, has been its vice president and a member of its board of directors. This company manufactures heavy machinery. (R. 31.)

The property of the American Manufacturing Company is situated in block 2103 of the City of Tacoma. Immediately to the east of this property, and separated from it by an alley 40 feet in width, are situated lots 7 to 12 of block 2103, which in 1936 were owned by other persons. At that time those lots were not level, in some places being as much as 30 to 40 feet below grade, and had little usable surface. For many years they had constituted a dumping ground for rubbish and scrap. In 1936, American Manufacturing Company under an oral agreement with the owners acquired the right to use these lots for open storage of steel and other materials and to make such fills as

might be necessary. By 1943, or 1944, the lots had been filled so as to become usable over their entire area. The American Manufacturing Company did not, up to that time, pay any rent or taxes for use of the lots. For a portion of 1943, it paid \$10 per month for the use of lots 8 to 12 under an oral agreement, after having installed an annealing oven on a portion of lots 8 to 12. The American Manufacturing Company agreed at that time to remove the annealing oven as soon as its use was terminated. (R. 31-32.)

In 1943, the American Manufacturing Company erected a craneway on lot 9 of block 2102 to be used for the moving of heavy equipment. The dimensions of lot 9 are 25 feet by 120 feet. A slab of cement 25 feet in width and approximately 60 feet in length was laid down and the craneway was then erected of wood with columns running the full length of 120 feet. (R. 32.)

The company was still in need of additional working space for steel cutting equipment. In October, 1944, the company owed a bank \$41,000. On January 1, 1946, it owed banks about \$172,000 and Cunningham Steel Foundry (owned by Eugene F. Cunningham) \$25,000. At the end of 1946 it owed banks about \$184,000. Grace H. Cunningham was endorser and guarantor of the bank loans. (R. 32.)

On October 26, 1944, Grace H. Cunningham purchased lots 7 to 12 of block 2102 for a price of \$8,000. At that time the American Manufacturing Company was expanding rapidly. Immediately following this purchase the American Manufacturing Company at

its own cost placed an adequate roof over the superstructure of the craneway and also enclosed the entire south side of the craneway, 120 feet, with large windows supported by hollow cement tile blocks. This constituted the cheapest type of construction permitted by the building code of the City of Tacoma. (R. 32-33.)

In November 1945, Eugene F. Cunningham desired to erect a warehouse building on lots 4, 5, and 6 of block 2102. Grace H. Cunningham had no interest in such lots nor in the building to be constructed thereon. Eugene F. Cunningham needed more area for the contemplated building and purchased lot 7 of block 2102 from his wife for \$1,333.33. He then erected a cement warehouse building 120 feet long and 100 feet wide known as the Graybar Building, which was ready for occupancy by May, 1946. The southerly wall of the building constituted the dividing line between lots 7 and 8. (R. 33.)

Grace H. Cunningham, being the largest stockholder and manager of American Manufacturing Company, was desirous of permitting the company to expand its business and to obtain necessary room by changing the craneway into a complete structure. In the latter part of December, 1945, she entered into an oral lease with the American Manufacturing Company covering lots 8 to 12 of block 2102. It was agreed that the American Manufacturing Company could use lot 8 which adjoined the Graybar Building and lot 9 for the purpose of enclosing both lots 8 and 9 as one large area 50 feet by 120 feet, this to be done by closing the two 50-foot ends by

use of large doors and using the south wall of the Graybar Building as the north wall of the enclosure. (R. 33-34.) The terms of this oral lease are substantially set forth in the minutes of a meeting of the board of directors of the American Manufacturing Company held on December 15, 1945, which contain the following (R. 34-35):

The President also announced that said Grace H. Cunningham was desirous of leasing said property to the American Manufacturing Company, Inc., on the following basis:

That the American Manufacturing Company would construct a building on said property at its own expense; would pay all the taxes, and at the end of a 6 year period, said lease would be terminated and the building on the property would revert to the owner of the real property, Grace H. Cunningham. That there would be no rent paid for said lease but that the consideration for the lease was the transfer of the building to Grace H. Cunningham at the end of the term of the lease. Therefore, after full discussion having been had, the following resolution was unanimously adopted:

“Be It Resolved, that the proper officers of the American Manufacturing Company, Inc., be instructed to prepare the proper instruments to lease from Grace H. Cunningham, Lots 8, 9, 10, 11 and 12, Block 2102, Tacoma, Land Company, Fifth Addition, Tacoma, Washington, for a period of six years commencing with the 2nd day of January, 1946. That the terms and conditions of said lease be such that the consideration for said lease would be the transfer of any and all interests that

the American Manufacturing Company, Inc., had in the building to be constructed on the premises to be transferred to Grace H. Cunningham. That American Manufacturing Company, Inc., would immediately commence construction of a building on said premises of the approximate value of \$25,000.00. That the proper officers of the American Manufacturing Company, Inc., also be instructed to pay the taxes on said property for the term of the lease.”

The lease was later reduced to writing in a written lease dated March 17, 1947. (R. 35.) Such lease provides for a term of 6 years from January 2, 1946, to January 2, 1952, and recited (R. 35-36):

The consideration for said lease being that the lessee will pay taxes on the above-described property for a period of six years and will transfer, at the end of the period of the lease, all right, title and interest which said lessee has in a building which lessee has constructed and paid for on the above-described property.

* * * * *

And at the expiration of said term, the said lessee will quit and surrender the said premises in good state and condition as they now are (ordinary wear and damage by the elements or fire excepted).

Prior to January 1, 1946, the American Manufacturing Company had expended \$2,800 for roofing of the craneway on lot 9 and the enclosure of the south wall with hollow tile and glass windows, and \$2,755 for grading and paving the alley. Subsequent to the effective date of the lease, January 2, 1946,

the American Manufacturing Company expended \$11,097 as cost of improvements which, pursuant to the lease, were to revert to Grace H. Cunningham at the end of the lease period. Another craneway was built on lot 8, next to the Graybar Building, a floor was laid, a roof was constructed over lot 8 (resulting in a roof over both lots 8 and 9), and doors were installed at the ends of the structure located on both lots 8 and 9. The improvements placed upon the property by the American Manufacturing Company which under the terms of the lease were to revert to the taxpayer are improvements attached to the realty. (R. 36.)

On March 29, 1946, Eugene F. Cunningham, as first party, and his wife and the American Manufacturing Company, Inc., as second parties, entered into a party wall agreement in which it was recited that the parties are the owners of adjoining pieces of property, and it was agreed that the south wall of the Graybar Building should thereafter be the common property of the parties to the agreement, and that the covenants contained in the agreement should run with the land. Since the Graybar Building was not as tall as the building on the lots of Grace H. Cunningham, it was necessary to extend the height of the wall by several feet. The party wall was completed in 1946, prior to the execution of the party wall agreement on March 29, 1946. The American Manufacturing Company paid \$4,734 in connection with the party wall. The party wall agreement was made as a part of or in connection with the oral lease. (R. 36-37.)

On January 2, 1952, the American Manufacturing Company released all right, title, and interest in and to the improvements, to Grace H. Cunningham. This release did not change or purport to change the rights of the parties under the party wall agreement. (R. 37.)

On January 14, 1952, the taxpayers, as husband and wife and as a community, executed a new lease with the American Manufacturing Company covering lots 8 and 9 and the east 40 feet of lot 10 in block 2102, together with improvements for a period of 10 years from and after January 1, 1952. The lessee agreed to pay \$10 per month and all taxes of every kind against the property and any and all other expenses of any kind or character incident to the occupation or maintenance of the premises. The lessee agreed that any additions or repairs or improvements placed upon the building should, at the expiration of the lease, become the property of the lessors. It further agreed to keep the building fully insured in an amount satisfactory to the lessors. (R. 37.)

Since January 1, 1952, the American Manufacturing Company has paid rent of \$10 per month, together with taxes, for lots 8 and 9 and the east 40 feet of lot 10 of block 2102. (R. 38.)

The only specified cash rent as such that was ever paid up to January 1, 1952, for the use of any part of the properties was \$10 per month for a portion of the year 1943, which was prior to the time Grace H. Cunningham purchased lots 8 to 12. (R. 38.)

The American Manufacturing Company capitalized the total cost of improvements on these lots

on its books and corporation income tax returns at \$21,904.33, and claimed a depreciation deduction of one-sixth of that amount in each of the taxable years 1946 to 1951, inclusive. (R. 38.)

The assessed valuation of the lots exclusive of improvements, as determined by the county assessor for the various years involved in the first lease period was \$2,800 and the average rate of taxation during such period was roughly 6.5 percent. The average annual tax during such period, exclusive of improvements, was \$182. The taxes on lots 8 to 12, inclusive, including improvements, for the years 1946 to 1950, were as follows:

1946, paid in 1947.....	\$218. 11
1947, paid in 1948.....	677. 11
1948, paid in 1949.....	588. 46
1949, paid in 1950.....	689. 63
1950, paid in 1951.....	620. 71

The annual cost of insurance was \$66.66. The policy does not protect the taxpayer nor does she carry insurance on the property. (R. 38-39.)

In determining the deficiency of Grace H. Cunningham, for the year 1946, the Commissioner added to her reported taxable income the amount of \$14,714.60 as rental income, stating that the cost of improvements placed in 1946 by the lessee upon lots 8, 9, 10, 11 and 12 constituted taxable income to her in that year as lessor, to the extent of the present fair market value of such improvements, subject to the lease, which would revert to her at the end of the six year term. (R. 39.) The Commissioner's

computation of the amount of \$14,714.60 was as follows (R. 39):

Cost of improvements—1946.....	\$21,904.33
Less: Depreciation for six-year term of lease at 2½ percent per year.....	3,285.66
<hr/>	
Depreciated or adjusted basis Jan. 2, 1952.....	18,618.67
Present value of \$1.00 payable at end of six years at 4 percent .....	.790314
<hr/>	
Fair market value of improvements January 2, 1946.....	14,714.60

In determining deficiency for the year 1952 of Grace H. Cunningham and Eugene F. Cunningham, the Commissioner added to their reported taxable income the amount of \$18,071.06 as rental income, stating that the cost of improvements constituted taxable income to them in 1952, to the extent of the fair market value of such improvements, when they reverted to them at the end of the six year term. (R. 39-40.) The amount of \$18,071.06 was computed by the Commissioner as follows (R. 40):

Cost of improvements—1946.....	\$21,904.33
Less: Depreciation for six-year term of lease at 2½ percent per year	3,285.66
<hr/>	
Fair market value of improvements Jan. 2, 1952.....	18,618.67
Less: Depreciation for 1952 on above improvements.....	547.61
<hr/>	
Increase in income.....	18,071.06

Included in the above cost of \$21,904.33 is the amount of \$4,734 paid by the American Manufacturing Company to constitute the south wall of the Graybar Building, a party wall. Also included is the amount of \$2,755, the cost of construction and hard-surfacing of the alley. The Tax Court held that this latter amount did not constitute a proper part of the cost of the building. (R. 40.)

The Tax Court concluded (R. 40-53) that the parties did not intend that the value attributable to the improvements should constitute rent and stated that it follows that they (R. 53) "did not derive [taxable] income attributable to such improvements either in 1946, or in 1952."

STATEMENT OF POINTS TO BE URGED

On appeal the United States urges and relies upon the points originally stated by it (R. 158-159), which are as follows:

With respect to the appeal of T. C. Docket No. 55,091, the Commissioner contends:

1. The Tax Court erred as a matter of law in failing to hold that taxpayers, Eugene F. Cunningham and Grace H. Cunningham, realized taxable income in 1952 equal to the then fair market value of improvements constructed by the lessee in 1946 upon the property involved subject to a six-year lease and which reverted to taxpayers in 1952 at the termination of the lease.

2. The Tax Court's finding that the value of the improvements made by the lessee did not represent rent upon termination of the lease in 1952 is clearly erroneous.

3. The Tax Court erred in failing to find the amount of the gross income received in 1952 by taxpayers, Eugene F. Cunningham and Grace H. Cunningham, attributable to the improvements placed upon the property by the lessee.

The Commissioner alternatively contends, with respect to the appeal of T. C. Docket No. 55,090, as follows:

1. The Tax Court erred as a matter of law in failing to hold that taxpayer, Grace H. Cunningham, realized taxable income in 1946, as lessor, equal to the January 2, 1946, value of improvements constructed by the lessee, which improvements, pursuant to the lease, were to and did revert to taxpayer at the end of the 6-year term.

2. The Tax Court's finding that the value of the improvements made by the lessee did not represent rent at the time of construction in 1946 is clearly erroneous.

3. The Tax Court erred in failing to find the amount of the gross income received in 1946 by taxpayer, Grace H. Cunningham, attributable to the improvements placed upon the property by the lessee.

SUMMARY OF ARGUMENT

Where the consideration for a lease is that the lessee shall erect a building or erect improvements on the leased property, and the building or improvements whose life extends beyond the term of the lease are to revert to the lessor at the end of the term, the lessor receives income under Section 22 (a) of the 1939 Code to the extent of the enhanced value of the property attributable to the building or improvements which revert to the lessor. Cf. *Helvering v. Bruun*, 309 U. S. 461.

After the decision of *Helvering v. Bruun, supra*, in which it was held that a lessor had received a wind-fall upon reversion of improvements, which without

forfeiture would *not* have outlasted the lease term, Congress in 1942 amended the 1939 Code to limit the recognition of income on termination of a lease from the enhancement of the value of property resulting from the erection of a building or improvements to that which constitutes rent.

Rent is that which an owner receives for the use or occupancy of real property. Where the sole specified consideration for occupancy is the construction of a building whose life extends beyond the term of the lease, which reverts to the lessor at the termination of the lease, the lessor as a matter of law receives the building for the occupancy of the premises as rent. When the building here was erected, though subject to the lease, the real estate was enhanced in value which enhancement either represented a prepayment to the lessor of rental or a prospective right to receive the building as rental at the expiration of the lease. Thus, there is no room for the intent of the lessor, and the Tax Court erred in not concluding that this enhanced value constituted rent as a matter of law.

The Tax Court not only erred as a matter of law in finding that the enhanced value of the premises due to the erection of the building did not constitute rent, but its finding was also clearly erroneous. Taxpayer was not only the principal stockholder, but was an officer of the corporation which resolved that the building would be erected, and that it would revert to the taxpayer, and was a signatory to the lease which stated that the reversion to her of the building was the consideration for the lease. Her tes-

timony as to intent, in the circumstances here, can but be directed at a legal change of a written instrument. Further, the asserted intent is not only contrary to the terms of the lease, but can have but one purpose—that is, to save taxes. If the testimony is to be considered at all, it must be considered with the fact that the lease was clearly not an arm's length transaction. If such an intent is to govern, then a taxpayer, as here, may contract with his controlled corporation to erect a valuable building upon his premises, amortize it fully for the benefit of the corporation over a period of six years, and then turn it over to him tax free. This, even where the lease specifically provides that the building will be consideration for the corporation's occupancy. We submit that Congress, in amending the statute after the decision in the *Bruun* case, had no such intention—that the purpose of the amendment was to prevent taxation of a windfall, where the life of the improvements and the terms of the lease show that the improvements were not intended as rental.

While we contend that the income was realized in 1952 when the building reverted to taxpayer under the facts of this case it is possible that income might have been realized in 1946 when the building was erected. Here the term of the lease is six years, and no question has been raised that the building will not outlast the term. Therefore it may be said that taxpayer's property was enhanced in value immediately upon erection of the building, and that the enhanced value represented a prepayment to the lessor of a portion of the rental.

The Tax Court did not make any finding with respect to the value attributable to the building either in 1946 or in 1952. Hence, we submit, in the event of a reversal this case should be remanded to the Tax Court with direction to find the enhanced value of the leased property attributable to the building erected in the year the income was realized.

ARGUMENT

The Tax Court erred in failing to hold that the fair market value of improvements erected by a lessee upon taxpayer's real estate and reverting to taxpayer in consideration for a lease of 6 years constitutes taxable income to her as rent

A. The law

Where the consideration for a lease is that the lessee shall erect a building or construct improvements on the leased property and the building or improvements shall revert to the lessor at the termination of the lease, the lessor receives income under Section 22 (a) of the 1939 Code, *supra*, to the extent of the enhanced value of the property attributable to the building or improvements which reverted to the lessor.

In 1940, the Supreme Court decided *Helvering v. Bruun*, 309 U. S. 461. In that case the owner leased a lot of land and the building standing on it for a term of 99 years. In accordance with the provisions of the lease, 14 years after the lease had been executed the lessee demolished and removed the existing building and constructed a new one which had a useful life of not more than 50 years. About 4 years after the erection of the new building the lease was cancelled for default in payment of rent and taxes and the owner regained possession of the land and build-

ing constructed by the lessee. The Commissioner included in the owner's income the difference between the fair market value of the new building and the undepreciated cost of the old which had been removed. The Supreme Court upheld the Commissioner's determination, holding (p. 469):

While it is true that economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property, payment of the taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction. The fact that the gain is a portion of the value of property received by the taxpayer in the transaction does not negative its realization.

Here, as a result of a business transaction, the respondent received back his land with a new building on it, which added an ascertainable amount to its value. It is not necessary to recognition of taxable gain that he should be able to sever the improvement begetting the gain from his original capital. If that were necessary, no income could arise from the exchange of property; whereas such gain has always been recognized as realized taxable gain.

There was no question in *Bruun* but that the taxpayer therein, the lessor, derived gain.¹ It is clear from the opinion that this gain was treated as a windfall and not as rental. This is the reason why Con-

¹The history of this question is treated at some length in *Bruun* and in *Hewitt Realty Co. v. Commissioner*, 76 F. 2d 880 (C. A. 2d).

gress 2 years later changed the statute, and the amendment involved here must be construed in this light.

Congress, by Section 115 of the Revenue Act of 1942, c. 619, 56 Stat. 798, added Section 22 (b) (11) to the 1939 Code to limit the recognition of income on termination of the lease to that which constitutes rent.² The Committee Reports explain this as follows (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 69 (1942-2 Cum. Bull. 372, 425); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 78-79 (1942-2 Cum. Bull. 504, 564-565)):

In *Helvering v. Bruun* (309 U. S. 461 (1940) * * *) it was held that building or other improvements made by a lessee constitute income to the lessor to the extent of the value of such improvements at the time the lease is forfeited and the lessor secures control and possession of the property. Your committee believes it advisable to exclude (except in cases where such improvements represent a liquidation in kind of lease rentals) from the gross income of the lessor income attributable to such improvements. Such exclusion from gross income of the lessor does not mean that the enhancement in value in the hands of the lessor will not be ultimately taxed. By reason of the fact that the gross income attributable to the value of the improvements is not recognized, the

²The Revenue Act of 1942 also added subsection (c) to Section 113 to provide that the basis of real property to the lessor should not be increased or diminished on account of payments received by the lessor which are excludable from income under Section 22 (b) (11).

basis of the property in the hands of the lessor will not be increased by such item.

* * * * *

Section 19.22 (b) (11)-1 was added to Treasury Regulations 103 by T. D. 5238, 143-1 Cum. Bull. 79, to conform to the 1942 statutory change. This provision, as later promulgated in Treasury Regulations 111, Section 29.22 (b) (11)-1, *supra*, is, in part, as follows:

Sec. 29.22 (b) (11)-1. *Exclusion From Gross Income of Lessor of Real Property of Value of Improvements Erected by Lessee.*—Income derived by a lessor of real property upon the termination, through forfeiture or otherwise, of the lease of such property and attributable to buildings erected or other improvements made by the lessee upon the leased property is excluded from gross income. However, where the facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals, the exclusion from gross income shall not apply to the extent that such building or improvements represent such liquidation. The exclusion applies only with respect to the income realized by the lessor upon the termination of the lease and has no application to income, if any, in the form of rent, which may be derived by a lessor during the period of the lease and attributable to buildings erected or other improvements made by the lessee. It has no application to income which may be realized by the lessor upon the termination of the lease but not attributable to the value of such buildings or improvements. Neither does

it apply to income derived by the lessor subsequent to the termination of the lease incident to the ownership of such buildings or improvements.

* * * * *

See also Section 39.22 (b) (11)-1 of Treasury Regulations 118, promulgated under the 1939 Code. This provision is currently in effect in Section 109 of the 1954 Code and Section 1.109-1 of Treasury Regulations on Income Tax, promulgated under the 1954 Code.

Thus, it is clear that the 1942 statutory amendment did not have any application to income representing a liquidation in kind of lease rentals attributable to improvements erected by a lessee, but was enacted to prevent the taxation of income which represented a windfall from cancellation of a lease. Thus, the question presented here is whether the enhanced value attributable to the improvements constitutes rent.

B. The Tax Court erred as a matter of law in not holding the enhanced value constituted rent

The Tax Court concluded (R. 53) that the parties to the lease "did not intend that the value of the improvements should constitute rent" and concluded "that the value of such improvements made by the lessee did not represent rent" based upon its finding that the parties did not so intend. We submit that the Tax Court erred as a matter of law in reaching this conclusion.

Rent represents payment for the use or occupation of real property and may be paid either in the form

of cash, or in the form of provisions, chattels, services or other property. Also, it may be paid ratably or in lump sums. No particular words are necessary to create an obligation to pay rent or the form of the rent to be paid so long as it appears that there was an agreement or understanding between the owner and the occupant of premises that some consideration was to be given for the use or occupancy of the premises. *M. E. Blatt Co. v. United States*, 305 U. S. 267; *Duffy v. Central R. R.*, 268 U. S. 55; *In re Roth & Appel*, 181 Fed. 667 (C. A. 2d); *In re Mullings Clothing Co.*, 230 Fed. 681 (Conn.), certiorari denied *sub nom. Chamberlin v. Mullings*, 243 U. S. 635; *In re Schulte-United*, 2 F. Supp. 285, 286 (S. D. N. Y.). See *Logan Coal & Timber Ass'n v. Helvering*, 122 F. 2d 848, 850 (C. A. 3d); *In re Bonwit, Lennon & Co.*, 36 F. Supp. 97, 100-102 (Md.). See also 32 Am. Jur. (1955), Landlord and Tenant, pp. 347-349, 362-363.

Where in addition to the provision for the erection of a building the lessee pays cash rental, there is room for the question of whether the building is to be considered rental. However, where, as here, the sole specified consideration for occupancy (except the payment of taxes) is "construction of a building on said premises of the approximate value of \$25,000.00" (R. 35) whose life (40 years) extends beyond the term of the 6-year lease, with no renewal clause, we submit, there is no room for the intent of the owner to whom the lease carefully provides it will revert. Clearly, under such facts the owner receives for the occupancy of the premises, a valuable building, either at

the beginning or at the end of the lease. When the building was erected, though subject to the lease, the real estate was enhanced in value and either "represented a prepayment to the lessor of * * * rental", *Miller v. Gearin*, 258 Fed. 225, 226,³ or a prospective right to receive the building which was actually received, at the expiration of the lease term with untrammelled right to dispose of it or use it in any manner she saw fit (cf. *M. E. Blatt Co. v. United States*, 305 U. S. 267, 280), giving rise to a taxable gain.

It is difficult to see how it is possible to "intend" that the enhanced value attributable to a building which comes to the lessor as sole consideration for the occupancy of his premises can be other than rent. In the present case it is clear that the consideration for occupancy of the premises over the 6-year period was the erection of the building and its reversion to the lessor. The lease provided that; and so did the corporate resolution authorizing rental of the property. Under these circumstances, as a matter of law, the enhanced value attributable to the building which reverted to taxpayers constituted rent.

C. The Tax Court's findings are clearly erroneous

The Tax Court ignored the factor that the enhanced value attributable to the building could constitute rent as a matter of law, but limited its decision solely

³The lease in *Gearin* did not as here require the lessee to erect a building. The oral lease here and the corporate resolution were made in 1945. (R. 60-61, 70-72.) It was not until March 17, 1947, after the erection of the building, that the written lease was executed. (R. 67-70.)

to the intention of the parties to the lease. The Tax Court found (R. 40, 53) that the parties did not intend the improvements should constitute rent and concluded from this that taxpayers did not receive any rental income from the lease. We submit that the Tax Court erred in this respect.

Where, as here, the question of intent will have an effect only taxwise, the close relationship of the parties cannot be overlooked. If facts which show that the transaction was not at arm's length are to be considered in determining the intent of the parties, the tax consequences which flow from such a transaction should also be considered.

The effect of the Tax Court's decision is to permit the lessee-corporation to deduct the entire cost of the building over the 6-year period of the lease rather than over the useful life of the building (which deduction inures both to the benefit of the corporation and to taxpayer as principal stockholder of the corporation) and yet charge taxpayer with no income upon receipt of the building at the expiration of the lease, even though the lease instrument states that the building is the consideration for which the lease is given.

Even if it were correct for the Tax Court to have relied solely upon the intention of the parties, we submit that the finding that the parties did not intend the building to constitute rent is clearly erroneous.

The Tax Court relied primarily (R. 52-53) upon the testimony of taxpayers that there was no intention to charge rent (R. 97-98, 132), and that the improvements did not have any value except for use by

the corporation or by someone in a similar business (R. 104-105, 111-113, 134, 136-137). We submit that reliance upon this testimony is clearly erroneous.

Since taxpayer was a signatory to the lease which stated that the reversion to her of the building was the consideration for the lease, her testimony to the contrary, directed at a change of the legal effect of a written instrument, should not be accorded any weight. *Jurs. v. Commissioner*, 147 F. 2d 805 (C. A. 9th); *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 873-875 (C. A. 9th); *Campbell v. Lake*, 220 F. 2d 341 (C. A. 5th); *Funk v. Commissioner*, 185 F. 2d 127, 129 (C. A. 3d); *Pugh v. Commissioner*, 49 F. 2d 76, 79 (C. A. 5th), certiorari denied, 284 U. S. 642. Cf. *Particelli v. Commissioner*, 212 F. 2d 498 (C. A. 9th).

Further, as we have pointed out, *supra*, taxpayer's testimony that (R. 52) "she had no intention of charging rent" is contradicted by the terms of the lease, which states (R. 68) that "the consideration for said lease being that the lessee will pay taxes on the above-described property for a period of six years and will transfer, at the end of the period of the lease, all right, title and interest which said lessee has in a building which lessee has constructed and paid for on the above-described property", by the terms of the corporate resolution (R. 70-72), and by the fact that she actually did receive the reversion of the building.

Also, the circumstances leading up to the signing of the lease contradict taxpayer's testimony and the Tax Court's finding that she did not intend to charge any rent for the lease. Both taxpayers testified that

Mrs. Cunningham purchased the vacant lots to enable the corporation to expand its business. (R. 95, 126.) If a corporation purchases lots, and constructs a building on its own lots, the corporation would be required to depreciate the building over its useful life, and not merely over the period of a short-term lease. By having its principal stockholder purchase the land and lease it the corporation would have the advantage of being able to deduct the entire cost of the building over the shorter term of the lease. (See R. 101, 105, 108-109.) Thus, a corporation would be able to recoup its entire costs of the building over a few years, and at the end of the lease term its principle stockholder would receive a building having value at no cost to him and free from tax.

Additionally, since taxpayer was the controlling stockholder of the corporation and its manager, and she negotiated the lease with her brother (R. 57-58, 61, 131), there does not appear to have been any arms-length bargaining between her and the corporation. By such an instance a lessor would profit as the principal stockholder of his lessee-corporation, by having it write off its cost in 6 years. Also, by having the corporation's directors state in the minutes that no rent was charged for the lease, the lessor would be able to avoid having the value of the building constitute rent to him.

Secondly, the taxpayers' testimony and the Tax Court's reliance upon the statement that the improvements lacked any value in the hands of taxpayers appears to be clearly wrong. The corporation continued to remain in business at the same place after

the initial 6-year lease expired. (R. 63-64, 76-77, 136.) Further, its sales expanded during the years 1952 through 1955. (R. 65-66.) Accordingly, it would appear that the corporation continued to have a need for the lots and building it had erected, which is substantiated by the fact that within 2 weeks after the 6-year lease terminated, the corporation and taxpayers entered into a new lease for only the two and a half lots with the building erected on it, rather than for five lots as before, for 10 additional years. (R. 76-79.)

The Tax Court made no findings that the building lacked value to the lessor. Indeed it assumed it had value. In any event it is clear that the building did have value. Taxpayers testified (R. 113, 136) that the building was a one type building. Even assuming taxpayers' testimony, nevertheless the building was admirably situated for use by the lessee-corporation. This is borne out by the increase in sales by the corporation after its erection and use of the building. (R. 65-66.) Certainly in an arm's length transaction taxpayers, after reversion, would have received a rental commensurate with the corporation's desire to occupy the premises. Further, the premises with the building would be of value to third persons, knowing as the Tax Court did that the corporation needed it so badly.⁴

Taxpayers' can find no comfort in *M. E. Blatt Co. v. United States*, 305 U. S. 267. There the lessor

⁴Taxpayers' testimony that the corporation was not able to purchase the lots is not relevant here, and any reliance upon such testimony by the Tax Court would be clearly erroneous.

leased property for use as a moving picture theater for a term of 10 years. At its own cost the lessor agreed to make certain alterations, and the lessee agreed to install motion picture equipment, theater seats and other fixtures, furniture and equipment at its cost. All improvements were completed before the lessee took possession. The total cost of all improvements was \$114,468.77; the lessor paid \$73,794.47; the lessee paid the balance of \$40,674.30. The estimated depreciated value at the termination of the lease of the alterations and improvements paid for by the lessee was agreed to as \$17,423.14. For the year in which the improvements were completed the Commissioner added to the income of the lessor \$1,742.31, or one-tenth of the depreciated cost. The Court stated (pp. 276-277):

We are not called on to decide whether under any lease or in any circumstances, income is received by lessor by reason of improvements made by lessee, nor to choose, for general approval or condemnation, any of the theories expounded by the United States. Concretely, the question presented is whether, under the lease here involved, one-tenth of what the commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. * * *

There is nothing in the findings to suggest that cost of any improvements made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. While the lease required it to make improve-

ments necessary for successful operation, no item was specified, nor the time or amount of any expenditure. The requirement was one making for success of the business to be done on the leased premises. * * * The facts found are clearly not sufficient to sustain the lower court's holding to the effect that the making of improvements by lessee was payment of rent.

The Court went on to hold (pp. 278-279):

The findings fail to disclose any basis of value on which to lay an income tax or the time of realization of taxable gain, if any there was. The figures made by the commissioner are not defined. The findings do not show whether they are intended to represent value of improvements if removed or the amount attributable to them as a part of the building.

* * * * *

Granting that the improvements increased the value of the building, that enhancement is not realized income of lessor. So far as concerns taxable income, the value of the improvements is not distinguishable from excess, if any there may be, of value over cost of improvements made by lessor. Each was an addition to capital; not income within the meaning of the statute. * * *

In *Blatt* the only year in issue was the year in which the improvements were completed. Thus, the Supreme Court did not have before it the question whether the enhanced value of the property attributable to the improvements was income in the year in which they reverted to the lessor. The Court there

stressed the fact that many of the fixtures were completely depreciable over the term of the lease, and that apparently the others by the end of the term would prove to be junk. Here the Tax Court has, as it must, assumed a value at the end of the term. In holding that no income was received in the year in which the improvements were completed the Court stated (p. 280):

But, assuming that at some time value of the improvements would be income of lessor, it cannot be reasonably assigned to the year in which they were installed. The commissioner found that at the end of the term some would be worthless and excluded them. He also excluded depreciation of other items. These exclusions imply that elements which will not outlast lessee's right to use are not at any time income of lessor. The inclusion of the remaining value is to hold that petitioner's right to have them as a part of the building at expiration of lease constitutes income in the first year of the term, in an amount equal to their estimated value at the end of the term without any deduction to obtain present worth as of date of installation. It may be assumed that, subject to the lease, lessor, became owner of the improvements at the time they were made. But it had no right to use or dispose of them during the term. Mere acquisition of that sort did not amount to contemporaneous realization of gain within the meaning of the statute.

The facts of the present case, on the other hand, clearly show that the terms of the lease are that the lessee (R. 72) "would immediately commence construc-

tion of a building on said premises of the approximate value of \$25,000.00"; and that (R. 68, 71, 72) the consideration for the lease would be the transfer of all interest in the building at the termination of the lease to the lessor, after a 6-year period, a period much shorter than the life of the building. These facts may give rise to income at the beginning of the term. Certainly they show an enhanced value at the end of the term. The year in which this enhanced value was realized is discussed below.

D. The year in which the gain was realized

While we contend that the income was realized in the year 1952 (*Helvering v. Bruun, supra*; *Lewis v. Pope Estate Co.*, 116 F. 2d 328 (C. A. 9th), certiorari denied, 314 U. S. 630; *Greenwood Packing Plant v. Commissioner*, 131 F. 2d 787 (C. A. 4th); *Trask v. Hoey*, 177 F. 2d 940 (C. A. 2d). See *Helvering v. Wood*, 309 U. S. 637, reversing *per curiam*, 107 F. 2d 869 (C. A. 7th); *Helvering v. Center Investment Co.*, 309 U. S. 639, reversing *per curiam*, 108 F. 2d 190 (C. A. 9th); see also Section 19.22 (a)-13 of Treasury Regulations 103, added by T. D. 4980, 1940-2 Cum. Bull. 42) we contend in the alternative that the gain was realized in 1946. We are not unmindful of this Court's decision in *Lewis v. Pope Estate Co., supra*. However, the facts in the instant case differ so substantially from *Pope* and other cases holding that no income is realized by a lessor at the time a building is erected by a lessee that we feel it possible that a different result might be reached here. In *Pope* the lease was for a period of 50 years, in *Center Investment Co.* for a period of over 97 years,

in *Bruun* for a period of 99 years, in *Hewitt Realty Co. v. Commissioner*, 76 F. 2d 880 (C. A. 2d), for 21 years with contingent option to renew for three successive like periods. In *Blatt* while the lease was for a period of only 10 years, the lessee's improvements were not a building but fixtures whose useful life depreciated during the term of the lease from 30 percent to 66 percent. In fact, in *Blatt*, the Commissioner found that some of the lessee's improvements would be exhausted at the end of the term. Items, building or fixtures which will not outlast lessee's right to use are not "at any time income of a lessor."

Such is not the fact here. The term of the lease is 6 years. No question has been raised that the building will not outlast the term. The Commissioner has determined it is depreciable at 2½ percent—has a life of 40 years. This has not been combatted with competent testimony. Can it be said that taxpayer's property was not enhanced in value immediately upon erection of the building—that taxpayer did not immediately acquire, for consideration of occupancy, an enhanced value, realized income. That "at that time it represented a prepayment to the lessor of a portion of the rental * * *" (*Miller v. Gearin, supra*, p. 226).

It is true that this enhanced value probably was included in and was not separable from the leased premises. It is also true that in *Blatt* it was held where inseparable no income was then realized. But, this was held on the facts of that case, citing *Hewitt* and cases therein cited. However, the Supreme Court in its later decision in *Bruun* not only overruled

Hewitt but limited *Blatt* to “the circumstances disclosed” in that case; and made it quite clear that it was holding that income was realized even on the assumption that, and to the extent that, the enhancement in value represented enhancement in value of the real estate, and not upon the ground that it represented the value of the building separated from the real estate (p. 468). Hence, all that seems left of the *Blatt* case is the uncertainty of future receipt. This seems eliminated here by specific provision of the lease that the property will be surrendered at the end of the term in “good state and condition” as they now are (ordinary wear and tear and damage by the elements or fire excepted).” (R. 35–36.)

It is in this light that we have felt that this Court might hold that under the facts of this case taxpayer realized income in 1946, and, hence, our contention that the income was realized in that year is an alternative to the contention that the income was realized in 1952.

E. Enhanced value attributable to the improvements

The Tax Court did not make any finding with respect to the value attributable to the building either in 1946 or in 1952. If this Court should reverse the Tax Court and hold that the value of the building represented rent for either of these years, we submit that this case should be remanded to the Tax Court to determine the proper amount to be included as rental income.

CONCLUSION

The decision of the Tax Court is wrong and should be reversed by this Court, and this case should be remanded to the Tax Court for further proceedings to determine the amount of rental income received under the lease.

Respectfully submitted,

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Department of Justice,

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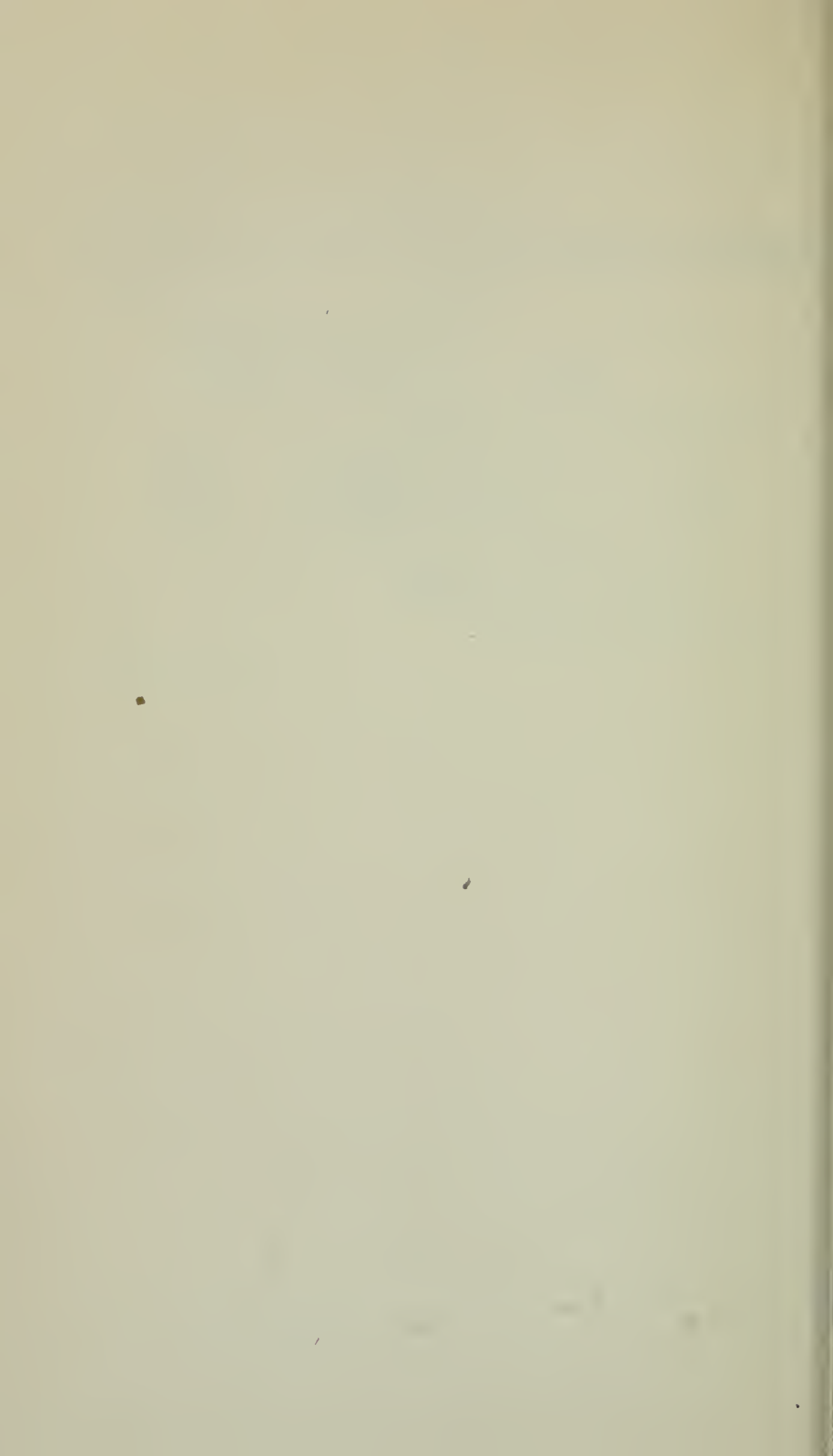
APRIL 1958.

APPENDIX

TABLE OF EXHIBITS PURSUANT TO RULE 18 (2) (F) AS
AMENDED

Exhibits	Set forth in printed record	Identified, offered and received
1-A-----	R. 67-70	R. 92
2-B-----	R. 70-72	R. 92
3-C-----	R. 73-75	R. 92
4-D-----	R. 76-79	R. 92

(37)



No. 15816

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JAMES WILSON, Relator and Best
Friend of Clifford Jefferson

Appellant,

v.

FRED DIXON, Warden of the California
State Prison at San Quentin, California

Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the
Northern District of California
Northern Division

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No. 15816

**IN THE
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JAMES WILSON, Relator and Best
Friend of Clifford Jefferson

Appellant,

v.

FRED DIXON, Warden of the California
State Prison at San Quentin, California

Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the
Northern District of California
Northern Division

STATEMENT OF THE CASE

On or about May 29, 1957, appellant sought to file a petition for writ of habeas corpus ad prosequendum and ad testificandum in the United States Court of Appeals for the Ninth Circuit. The document was addressed to Hon. William Denman. (Tr. 2.) On June 12, 1957, Hon. William Denman because of the pressure of work as Chief Judge of the Circuit declined

to entertain the application and transferred it to the United States District Court for the Northern District of California, Northern Division. (Tr. 1.)

On June 24, 1957, Judge Halbert, denied the petition for writ of habeas corpus ad prosequendum and ad testificandum as well as the motion for leave to file a criminal complaint. (Tr. 56-59.) A petition for rehearing in this matter was denied on July 5, 1957, and an "Affidavit for Certi[fiac]te of Probable Cause" was denied on July 12, 1957, on the ground that in the court's opinion the appeal was not taken in good faith. (Tr. 59-84.)

On November 7, 1957, a petition for certificate of probable cause and allowance of an appeal in forma pauperis was granted by Chief Judge Stephens even though the document presented was tangled and practically unintelligible "In order that petition may be assured of the full flow of [s]ue process of law." (Tr. 56.)

A petition for writ of assistance filed by appellant in this court was dismissed on January 15, 1958, as frivolous and on or about February 18, 1958, appellant filed his brief on appeal in propria persona.

STATEMENT OF FACTS

This proceeding arises out of the efforts of appellant Wilson, an inmate of Folsom State Prison, Represa, Sacramento County, California, to file a petition for writ of habeas corpus on behalf of another inmate, one Clifford Jefferson, an inmate of San Quentin

State Prison, Marin County, California. Jefferson is confined in the California state prison under sentence of death for a violation of Section 4500 of the California Penal Code. *People v. Jefferson*, 47 Cal. 2d 438, 303 P. 2d 1024, cert. den. 352 U.S. 1029, 1 L. Ed. 2d 600, 77 S. Ct. 597.

On March 18, 1957, Jefferson had filed his own petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, numbered 36282 on the files of that court. After a hearing in the case, Judge Goodman denied the petition for habeas corpus on April 16, 1957. A certificate of probable cause was granted and a notice of appeal filed on April 29, 1957. After briefs were filed and the matter argued, this court on November 15, 1957, affirmed the order of the District Court. (*Jefferson v. Teets*, 248 F. 2d 955.) A petition for writ of certiorari to the United States Supreme Court was denied on March 3, 1958. (26 Law Week 3250.)

From the allegations of the appellant's various documents contained in the Transcript on Appeal as well as from appellant's brief, it appears that Wilson on or about March 19, 1957, sought to file an application for writ of habeas corpus ad instantia which he had prepared on behalf of Jefferson. (Tr. 3-4.) This document was held up for a short period of time prior to mailing by the prison officials. (Tr. 5.) Appellant thereafter learning from the newspapers that Jefferson's own petition for habeas corpus had been denied

in the District Court prepared an “Affidavit; Motion for Permission to File Supplement Brief; and Supplement Brief” in *Jefferson’s* case. (Tr. 5, 36-53.) The prison authorities refused Wilson permission to mail these documents at that time. (Tr. 9-10.)

Appellant then sought to file the instant petition for writ of habeas corpus ad prosequendum and ad testificandum as well as “complaint-criminal” to which documents were attached “Affidavit; Motion for Permission to File Supplement Brief; and Supplement Brief.” (Tr. 7-55.) Appellant sought to file this document as “Relator and Best Friend of Clifford Jefferson.” (Tr. 1.)

Appellant in these documents contended that Section 4500 of the California Penal Code had been discriminatorily applied as to Jefferson; that although appellant had so advised Jefferson’s attorneys prior to trial in the state courts they had not availed themselves of Wilson’s advice and hence were guilty of “suppressing evidence favorable to Jefferson.” (Tr. 37-43.) The petition also alleged that Wilson and Jefferson were deprived of their civil rights by reason of the fact that the prison officials as well as the Attorney General’s Office of the State of California had refused to immediately allow the mailing of these various documents (prepared by appellant on behalf of Jefferson) to the courts (Tr. 8-30.) and thus appellant was entitled to the issuance of a criminal complaint against the responsible parties and Jefferson was entitled to his release upon habeas corpus. (Tr. 7-50.)

The memorandum opinion of the District Judge in denying the petition for writ of habeas corpus ad prosequendum and ad testificandum with the related documents was to the effect: (1) that the inmate on whose behalf the writ was sought namely, Clifford Jefferson, was not within the territorial jurisdiction of the District Court; (2) that appellant had failed to comply with the jurisdictional requirements in his petition and that it failed to state a cause of action; and (3) that the District Court had no jurisdiction to issue a criminal complaint in the form submitted by appellant. (TR 56-59.)

SUMMARY OF ARGUMENT

Appellant's Contentions

Apparently appellant is contending on this appeal that the District Court erred in denying his petition and the incorporated documents on the following grounds: (1) that the application of Section 4500 of the California Penal Code as to inmate Jefferson was discriminatory and Jefferson's conviction was a violation of due process of law; (2) that Jefferson's trial attorneys who were court appointed were officers of the state and their refusal to present this argument constituted "suppression of evidence favorable to Jefferson" by the state; (3) that the actions of the prison authorities and the Attorney General's Office in refusing to permit the immediate mailing of Wilson's petitions on behalf of Jefferson constituted a violation of the civil rights of both Wilson and Jeffer-

son; (4) that such alleged interference by the state authorities with Wilson's civil rights constituted a "conspiracy" for which he was entitled to the issuance of a criminal complaint; and (5) that the total of these complaints rendered the imprisonment of Jefferson illegal and void and hence Jefferson was entitled to a writ of habeas corpus.

Respondent's Contentions

Respondent submits that the action of the District Court in denying the petition and related documents was proper as (1) the petition failed to state facts entitling petitioner and appellant herein to any relief from a federal court; (2) that appellant had no right under either the state or federal laws or constitutions to practice law; (3) that the prison authorities have the duty of maintaining discipline in state prisons and in no manner have violated any rights guaranteed to appellant under either the state or federal constitutions.

ARGUMENT

I. The Petition for Writ of Habeas Corpus Ad Prosequendum and Ad Testificandum as Well as the Supplemental Documents Failed to State Facts Entitling Appellant to Relief from the Federal Courts

Appellant by the various documents entitled petition for writ of habeas corpus ad instantia, petition for habeas corpus ad prosequendum and ad testificandum was not seeking to obtain his release from unlawful confinement under a state judgment but was

seeking to effect the release of another state prison inmate, Jefferson. Appellant sought to raise on behalf of Jefferson an argument which neither Jefferson nor his attorneys sought to raise in the state courts, either at trial or on appeal or in the federal courts. Jefferson was admittedly represented by counsel in both the state and federal courts. Nevertheless, appellant, who was not in any manner involved in the charge against Jefferson, seeks to raise points which he believes would invalidate Jefferson's state conviction for the first time in a federal habeas corpus proceeding. In so doing he alleges on the face of his petition that his arguments had been presented to Jefferson's attorneys prior to the trial in the state courts and that they had rejected them and hence appellant charges that this act "constituted suppression of evidence favorable to Jefferson" by the state authorities.

The point that appellant sought to urge in the habeas corpus proceeding was that Section 4500 of the California Penal Code was unconstitutional because of its discriminatory application to Jefferson by the prosecuting authorities of Sacramento County. Appellant predicated this contention on his belief that certain other inmates of the state prison had committed similar acts and had not been prosecuted under this section. It is obvious that his contention is without merit. The question of whether or not certain other individuals should or should not be prosecuted for a violation of a criminal statute is a matter residing within the discretion of the district attorney of the

particular county. His determination as to whether he has sufficient evidence to present the matter is one that is not subject to review. The constitutionality of Section 4500 of the Penal Code as well as its predecessor (Sec. 246 P. C.) has been fully considered both by the California courts and the United States Supreme Court and upheld in both instances. (*People v. Finley*, 153 Cal. 59, 94 P. 248; *Finley v. California*, 222 U. S. 28; *People v. Wells*, 33 Cal. 2d 330; 202 P. 2d 53; *In re Wells*, 35 Cal. 2d 889, 221 P. 2d 947.) Jefferson in his own actions sought to attack the constitutionality of this statute and his contentions were rejected (*Peo. v. Jefferson*, 47 Cal. 2d 438, 303 P. 2d 1024; cert. den. 352 U. S. 1029, 1 L. Ed. 2d 600, 77 S. Ct. 597) as well as by this Court in *Jefferson v. Teets*, 248 F. 2d 955, cert. den. 26 U. S. Law Week 3250.

The face of the petition discloses that both Jefferson and his counsel had been advised of appellant's contentions prior to the trial in the state courts and apparently found no merit in this contention which was not sought to be raised therein. It is patent that at this time, appellant who is in no manner affected by the application of such statute may not seek to attack its constitutionality in its application to Jefferson. (*Brown v. Allen*, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469; *Darr v. Burford*, 339 U. S. 200, 94 L. Ed. 767, 70 S. Ct. 587.)

Further, the allegations to the effect that the court appointed counsel of Jefferson in the state courts were state officers and their failure to act in accordance

with appellant's legal theories constituted "the suppression of evidence favorable to Jefferson" is totally without merit. Under California law when attorneys are appointed to represent a defendant in a criminal case, they stand in the same position to such defendant as would his private counsel. (*In re Atchley*, 48 Cal. 2d 408, 310 P. 2d 15; *In re Hough*, 24 Cal. 2d 522, 150 P. 2d 448.) So regardless of appellant's contentions it clearly appears that Jefferson had full opportunity to present the question of the application of Section 4500 of the Penal Code as to himself in the state and federal courts and did not do so either by himself or through his various counsel which the courts appointed to represent him and hence such question would be waived. (*Brown v. Allen*, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469.) Since there was a failure to raise this question in the state courts there was no exhaustion of state remedies as to this point and it may not be raised for the first time in a petition for writ of habeas corpus in a federal district court since California provides for an adequate post-conviction remedy. (*Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791; *Darr v. Burford*, 339 U. S. 200, 94 L. Ed. 767, 70 S. Ct. 587.)

Insofar as the allegations of the petition for writ of habeas corpus ad prosequendum and ad testificandum are concerned, the petition on its face disclosed that Jefferson, the person on whose behalf the writ was sought was outside the territorial jurisdiction of the court. The appellant, Wilson, was confined in

Folsom State Prison, Represa, California. This was within the jurisdiction of the Northern District, Northern Division of the District Court. Jefferson was confined in San Quentin State Prison, Marin County, which was within the jurisdiction of the Northern District, Southern Division. (28 U. S. C. 84.) Hence it appeared that the person on whose behalf the writ was sought was not within the territorial division and the court had no jurisdiction over the warden of the state prison wherein Jefferson was incarcerated. (*Ahrens v. Clark*, 335 U. S. 188; *McAffee v. Clemmer*, 171 F. 2d 131; *Johnson v. Matthews*, 182 F. 2d 677.)

As to appellant's alleged deprivation of his civil rights no showing was made on the face of the petition that he sought relief from the state courts as to any deprivation of these rights and hence he would not have exhausted his state remedies. (*Darr v. Burford*, 339 U. S. 200; *Brown v. Allen*, 344 U. S. 443.)

It also appears on the face of the various documents submitted that appellant did not comply with the provisions of Sections 2244 or 2254 Title 28 U. S. C. He has shown no reason on behalf of Jefferson as to why the allegations sought to be presented could not have been presented by Jefferson in his prior petition and actions in the state and federal courts. On the contrary, it appears on the face of the documents that appellant, notwithstanding the pendency of habeas corpus actions on behalf of Jefferson in another division of the District Court and in this Court, contended

that he had a right to file additional documents on behalf of Jefferson in another District Court. It is merely an attempt to circumvent the provisions of Section 2244 Title 28 and burden the court with a multiplicity of actions.

Thus it would appear that the action of the District Court in denying the petition for writ of habeas corpus ad prosequendum and ad testificandum was proper on the various grounds as set forth in the memorandum opinion of the court.

II. Appellant Has Neither a Constitutional Right Nor Any Right to Practice Law While an Inmate of a State Prison

As is apparent from an examination of the various documents submitted by appellant herein, he is claiming that he has a right both under state and federal statutes to practice law while an inmate of a state prison. Appellant neither was nor is an attorney. He was neither a codefendant nor in any manner involved in the proceeding which culminated in Jefferson's being convicted of a violation of Section 4500 of the California Penal Code. Jefferson was represented by able and competent counsel in the state trial courts and on appeal. (*People v. Jefferson*, 47 Cal. 2d 438, 303 P. 2d 1024, cert. den. 352 U. S. 1029, 1 L. Ed. 2d 600, 77 S. Ct. 597) as well as in the federal courts (*Jefferson v. Teets*, 248 F. 2d 955, cert. den. March 3, 1958, 26 U. S. Law Week 3250).

Appellant in the instant proceedings was a mere interloper without any interest in the matter, who without permission or request from Jefferson, sought

to intervene in such proceedings and to initiate additional ones on behalf of Jefferson.

Appellant has based his right to so act upon the provisions of Section 1474 of the California Penal Code and upon his interpretation of Section 2242, Title 28 U. S. C. Section 2242, Title 28 U. S. C. provides that a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. The words "or by someone acting in his behalf" were added to the statute in 1947. The Code Reviser's Notes stated that the amendment conformed to the actual practice of the courts as set forth in *U. S. ex rel. Funaro v. Watchorn*, 164 F. 152; *Collins v. Traeger*, 27 F. 2d 842. The cited cases disclose that the courts only permitted a petition for writ of habeas corpus to be filed on behalf of another person where the petition set forth some reason or explanation satisfactory to the court showing why the petition was not signed and verified by the person detained and what relation the next friend bore to such person. (*U. S. ex rel. Bryant v. Houston*, 273 F. 915; *Gusman v. Marrero*, 180 U. S. 81; *Ex parte Hibbs*, 26 F. 421; *In re Craig*, 70 F. 969; *In re Chavez*, 72 F. 1006; *Ex parte Dostel*, 243 F. 664; *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437.)

Upon the face of the instant petition it appeared that Jefferson had filed his own petition for habeas corpus. Appellant had no authority to file such a document upon behalf of Jefferson. No showing was or could be made that appellant had any interest in the

matter. He was purely an intruder or uninvited meddler styling himself next friend. As stated by the court in *U. S. ex rel. Bryant v. Houston*, 273 F. 915:

“It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friend. *Gusman v. Marrero*, 180 U.S. 81. * * *”

Wilson was not a codefendant with Jefferson in the state courts upon the 4500 Penal Code charge. Wilson had no personal interest in this matter to protect. Jefferson was in no way precluded from seeking his own relief in both state and federal courts. Wilson had no right to practice law in either the state or federal courts. Hence under no circumstances could he be considered in the same category as Egan in the case of *In re Egan*, 24 Cal. 2d 323, 149 P. 2d 693 and Wilson would not fall within the purview of Section 1474 of the California Penal Code.

The practice of law is a privilege not a right. The right to practice law not only presupposes in its possessor integrity, legal standing and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust. (*Townsend v. State Bar*, 210 Cal. 362, 291 P. 837; *In re Lavine*, 2 Cal. 2d 324, 41 P. 2d 161.) It can hardly be urged that appellant herein possessed these qualifications.

This court may take judicial notice of the fact that innumerable petitions for writs of habeas corpus are filed by the various inmates of state prisons. In many

instances, as in the present one, they are virtually unintelligible. To uphold a contention such as is urged by appellant herein, that he has a right under both the federal and state statutes to file such documents on behalf of another inmate, would add to the already heavy burden placed on the courts. It would in no way assist in preserving the constitutional rights of such inmates. There is no doubt that if inmates were permitted as a matter of right to file documents on behalf of other inmates there would be no end to useless and frivolous litigation. The court files would be cluttered with documents without merit.

The inmate on whose behalf the present actions were instituted had his rights fully protected under both state and federal law. He was in no manner deprived of "due process of law." Appellant seeking to act upon behalf of such inmate is in reality demanding a right to practice law. He is demanding not "equal protection of the laws" but on the contrary, the enforcing of special privileges to which he is not entitled any more than any other layman in California. Patently, the District Court acted properly in denying the petition and related documents inasmuch as appellant was seeking a privilege to which he was not entitled and in no manner had demonstrated that the alleged rights of which he was deprived were such as to raise a federal question cognizable by habeas corpus in a federal district court. (*In re Meek*, 138 F. Supp. 327.)

III. The Prison Authorities of the State of California Did Not Deprive Appellant of Any Rights to Which He Was Legally Entitled or For the Deprivation of Which He Might Seek Relief in a Federal District Court

It is well established that censorship of mail is a problem of prison discipline in which the courts will not interfere. (*Dayton v. McGranery*, 201 F. 2d 711; *Numer v. Miller*, 165 F. 2d 986; *Stroud v. Swope*, 187 F. 2d 850; *Ortega v. Ragen*, 216 F. 2d 561; *Adams v. Ellis*, 197 F. 2d 483; *Morris v. Igoe*, 209 F. 2d 108; *State v. Gladden*, 240 F. 2d 910; *Gerrish v. State of Maine*, 89 F. Supp. 244; *Reilly v. Hiatt*, 63 F. Supp. 477; *Green v. State of Maine*, 113 F. Supp. 253; *In re Chessman*, 44 Cal. 2d 1, 279 P. 2d 24.)

A prisoner has the right to communicate with the court relating to any matter involving his incarceration. (*Ex parte Hull*, 312 U. S. 546; *Cochran v. Kansas*, 316 U. S. 255.) This right, however, does not extend to the preparation of legal documents on behalf of other inmates who have already prepared their own petitions either by themselves or through counsel.

On the contrary, an inmate of a state prison is not entitled to either unlimited time for legal research nor to research problems affecting other inmates which in no manner pertain to the inmate's own case. (*In re Chessman*, 44 Cal. 2d 1, 279 P. 2d 24.)

Section 5058 of the California Penal Code provides that the director may prescribe rules and regulations for the administration of the prisons and may change

them at his pleasure. Pursuant to this provision, prison Rule F 2, 2602 was adopted. This rule provides:

“Legal documents found in the possession of an inmate not pertaining to his own case will be confiscated. An inmate is permitted to work on his own case in his leisure time in compliance with the rules and regulations of the institution. An inmate found to be assisting another inmate in preparation of legal documents is subject to disciplinary action.”

This rule was clearly within the power of the prison authorities to promulgate in conjunction with the carrying out of their duties under state laws. As stated in *Siegel v. Ragen*, 180 F. 2d 785, 788: “The Government of the United States is not concerned with, nor has it power to control or regulate the internal discipline of the penal institutions of its constituent states.” The United States Supreme Court in the case of *Price v. Johnston*, 334 U. S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356, stated:

“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”

Thus it would appear that no matter how wide the approach to the problems presented, appellant has failed to disclose that impingement on some federal right owing either to him or to Jefferson. Appellant for neither himself nor Jefferson has stated a cause of action under the Fourteenth Amendment, 42 U. S. C. 1983, 1985 (3), 18 U. S. C. 242, or 28 U. S. C.

2254. (*U. S. v. Ragen*, 237 F. 2d 953; *Tabor v. Hardwick*, 224 F. 2d 526; *Wagner v. Ragen*, 213 F. 2d 294; *Kelly v. Dowd*, 140 F. 2d 81.)

IV. The District Court Did Not Err in Denying Appellant the Right to File a Criminal Complaint Against the Prison Authorities or Other State Officials

As part of the various documents submitted by appellant was one entitled "complaint-criminal" (Tr. 30-36). That this document was totally without merit and the district court properly dismissed such matter is apparent. The civil rights statutes only give a right of civil action for a deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States. (*Tenney v. Brandhove*, 341 U. S. 367, 71 S. Ct. 783, 95 L. Ed. 1019; *U. S. v. Williams*, 341 U. S. 70, 71 S. Ct. 581, 95 L. Ed. 747.) Title 18 U. S. C. Sections 241 et seq. only covers conduct which interferes with rights arising from the substantive powers of the Federal Government and does not apply to interference by state officers with rights which the Federal Government merely guarantees from abridgment by the State. (*U. S. v. Williams*, 341 U. S. 70, 71 S. Ct. 581, 95 L. Ed. 747.) In the present matter, appellant has failed to establish that the state officers have conspired to or did deprive him of any "right" which was in any way secured to him by the Constitution or laws of the United States. Neither he nor Jefferson have in any manner been deprived of due process of law. By virtue of his status as a convict, appellant is not given greater rights than other citi-

zens of the State of California or the United States. (*In re Chessman*, 44 Cal. 2d 1, 279 P. 2d 24.) He clearly has failed to state a cause of action for relief under either the civil or penal provisions of the civil rights statutes. (*Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Alzua v. Johnson*, 231 U. S. 106, 34 S. Ct. 27, 58 L. Ed. 142; *Kenny v. Fox*, 232 F. 2d 288; *Jennings v. Nester*, 217 F. 2d 153; *Peckham v. Scanlon*, 241 F. 2d 761; *U. S. v. Bibb*, 249 F. 2d 839.)

It is well established that a federal court will not interfere with the conduct of state officials in carrying out their duties imposed under state laws. Appellant in no manner demonstrated that he was deprived of any "right" protected by either the federal laws or Federal Constitution when the state officials did not immediately forward his documents to the court. These documents did not relate to his own case. They were an attempt by appellant to practice law on behalf of another inmate of a state prison. Appellant had no right to engage in the practice of law. The denial of such right by the prison authorities in matters not relating to the applicant's own case or his present incarceration can in no manner be urged as a deprivation of civil rights nor as a conspiracy under color of state law to deny appellant his rights guaranteed by the Federal Constitution. Moreover, the documents were forwarded to the courts and found to be without merit. Appellant cannot show any prejudice from the delay. It would appear that his claims in every respect are without merit.

Conclusion

Respondent submits that a review of this record demonstrates that the action of the district court in denying the petition for habeas corpus ad prosequendum and ad testificandum and related papers was proper and in no manner deprived appellant of that due process of law to which he was entitled.

The upholding of a contention such as maintained by appellant herein would permit each of the some 15,000 inmates of the state prisons of California to file petitions for writs of habeas corpus as a matter of right upon behalf of other inmates. It would compel the prison authorities to forward these documents to the courts immediately, regardless of whether the inmate on whose behalf the petition was sought had documents of his own on file in that court. It would increase the burdens already placed upon the courts thousandfold and fail to accomplish any additional protection for the respective inmates. Where as in the present case the inmate on whose behalf these documents were sought to be filed has been accorded the full flow of due process in both the state and federal courts, the contention of appellant herein constitutes but a "mockery of justice." Appellant cannot nor has shown any reason for his intervention than that of an unwarranted meddler and an unlicensed attorney at law. The documents submitted to the district court neither complied with the requirements of Title 28 U. S. C. 2254 nor in any manner presented a substantial federal question. The questions presented are

ones involving prison discipline and do not in any way reflect a deprivation of a right given appellant under the federal law or the United States Constitution.

It would therefore appear that the present appeal is without merit and should fall within the provisions of *Tate v. Heinze*, 187 F. 2d 98 and *Higgins v. Steele*, 195 F. 2d 366 and should be dismissed as frivolous.

Respectfully submitted,

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No. 15,824

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOSEPH BONNEY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEE.

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No. 15,824

IN THE

**United States Court of Appeals
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JOSEPH BONNEY,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted in the District Court for the District of Alaska, First Judicial Division, at Ketchikan, the Honorable Raymond J. Kelly presiding, after a jury trial and verdicts of guilty on three counts of the crime of Obtaining Money by False Pretenses. A sentence of two years imprisonment on each count was imposed, with the provision that eighteen months of each sentence be suspended on certain conditions, and that the sentences be served concurrently. Appellant filed notice of appeal from the judgments and sentences imposed by the court.

Jurisdiction below was based upon 48 U.S.C. § 101, and in this court is based upon 28 U.S.C. § 1291.

STATEMENT OF CASE.

The only errors claimed by the appellant in this case are the denials of his motion to dismiss the indictment as failing to state a crime and his subsequent motion for re-argument and reconsideration of that matter. Without repeating the three rather lengthy counts of the indictment, they may be summarized as charging the appellant with obtaining money by falsely representing his intention at the time of soliciting clothing orders. The indictment charged that in each of the three instances the appellant did not intend to forward the clothing orders to tailoring houses, contrary to the intention he conveyed to his customers.

The appellant's motion to dismiss was based upon the premise that the implied intention of performance was merely a promise to do something in the future and therefore did not come within the scope of a false pretense. The trial court denied the motion on the grounds that the legislative intent was to prohibit the obtaining of property by falsely representing present intention.

Therefore, a single issue is presented to this court: Can a false statement of intention constitute a false pretense within the meaning of Sec. 65-5-81, ACLA 1949?¹

¹“65-5-81. Obtaining Money or Property by False Pretenses. That if any person shall, by any false pretenses or by any privy or false token, and with intent to defraud, obtain, or attempt to obtain, from any other person any money or property whatever, . . . such person, upon conviction thereof, shall be punished . . .”

SUMMARY OF ARGUMENT.

A misrepresentation of present intention is a misrepresentation of an existing fact, and is a false pretense within the meaning of the Alaska Statute.

(1) The exclusion of a misrepresentation of present intent from false pretenses is traceable to a misinterpretation of the original statute defining the crime of obtaining money by false pretenses.

(2) There is no logical basis for making a distinction between a state of mind and other present facts, with regard to false pretenses.

(3) There are no special circumstances or practical considerations which require that misrepresentation of a state of mind be treated differently than misrepresentation of other existing facts.

(4) There are a substantial number of well-reasoned cases in accord with the holding of the trial court in the case at bar.

(5) The Ninth Circuit, Oregon, and Alaska cases cited by appellant did not involve the situation now before the court. The case is one of first impression in this jurisdiction.

(6) The trial court's ruling is logically and practically sound. No error has been shown.

ARGUMENT.

A MISREPRESENTATION OF PRESENT INTENTION IS A MISREPRESENTATION OF AN EXISTING FACT, AND IS A FALSE PRETENSE WITHIN THE MEANING OF THE ALASKA STATUTE.

The government concedes that the majority of jurisdictions hold that false promises, however fraudulent, relate to the future rather than to past or existing facts and therefore do not fall within the scope of "false pretenses." However, an examination of the majority rule shows it to be neither historically nor logically sound.

- (1) The exclusion of a misrepresentation of present intent from false pretenses is traceable to a misinterpretation of the original statute defining the crime of obtaining money by false pretenses.

In an excellent article, *Theft by False Promises*, 101 U. of Pa. L. Rev. 967, 968-978, Arthur R. Pearce has analyzed the early cases decided under the forerunner of present day false pretense statutes, 30 Geo. II, Ch. 24 (1757). The statute provided punishment for "all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person . . . money, goods, wares, or merchandizes, with intent to cheat or defraud any person . . ." Prior to that time a somewhat related crime involving fraud was the common law offense of cheating, which required a showing that the fraud was effected by some material device or token against which common prudence and caution could not guard.

The first instance of an attempt to make a distinction between false statements concerning the past,

present and future under the new statute is found in *Rex v. Young*, 3 Durn. & E. 98 (1789). The defendant was charged with obtaining money by false pretenses, having fraudulently induced one Thomas to pay for a share of a bet on a race which was to be run shortly, and was a "sure thing." The jury returned a verdict of ~~not~~ guilty and the case was taken to the King's Bench on a writ of error. In arguing the appeal, counsel for the Appellant contended:

"Where the representation is ^{of} a thing *past* or *present*, against which caution cannot guard, it may come within the statute but if it be a representation of some future transaction, concerning which enquiries may be made, it is not an indictable offense under this statute, but is only the subject of a civil remedy; because the party can only be imposed upon through his own negligence."

3 Durn. & E. at p. 100.

The argument was an attempt to carry into the new statute a limitation that the fraud be one against which common caution could not guard, and assumed that any false pretense relating to the future could be guarded against by common caution. However, the court was unanimous in rejecting the argument and it held that the statute created a new offense which was broader than common law cheating.

The Law Review article also cites an opposite result which was reached in 1821 in *Rex v. Goodhall*, Russ. & Ry. 461, 168 Eng. Rep. 898. That case, however, was from a lower court, which was incapable of over-

ruling the decision of the King's Bench in *Rex v. Young*. Goodhall had ordered a quantity of meat, and, upon the arrival of the delivery boy, persuaded him to leave the meat and deliver a message to his master that he had a note which he would give as payment if the master would send back the proper change. Goodhall never did pay the debt and was prosecuted for obtaining property by false pretenses. Following a verdict of "guilty," the trial Judge reserved judgment and submitted the case for the consideration of the entire bench. Apparently no argument of the case was had before the judges, and in reaching the conclusion that the facts did not bring the case within the crime of obtaining property by false pretenses, Professor Pearce is of the opinion that they overlooked the prior ruling of the King's Bench in *Rex v. Young*. The reason given in *Rex v. Goodhall* for reversing the conviction was that "it was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from it." Russ & Ry. 461, 463, 168 Eng. Rep. 898, 899.

Pearce views *Rex v. Young* as the King's men marching up the hill, but in *Rex v. Goodhall* he observes that they marched back down again. "It was not the same men; it appears that they did not even know it was the same hill . . ." *Theft by False Promises*, 101 U. of Pa. L. Rev. 967, 972.

Several leading writers on the English criminal law of this period, recognized the holding of *Rex v. Young* to be a correct statement of the law relating to false pretenses, and confined *Rex v. Goodhall* to its

particular facts. They asserted that it is no objection that the false pretense relates to some event to take place at a future time. Roscoe, *Digest of the Law of Evidence in Criminal Cases*, 418 (2d Am. Ed. 1840); Archbold, *Pleading and Evidence in Criminal Cases*, 183 (3d Ed. 1828). However, another writer on Criminal Law, Wharton, seemingly made the same oversight as the court in *Rex v. Goodhall*, and stated:

“In the first place, it will be noticed that the false pretences, to be within the statute, must relate to a state of things averred to be at the time existing, and not to a state of things thereafter to exist.”

“A pretence that the party would do an act that he did not have mean to do (as a pretence that he would pay for goods on delivery) was holden by all the judges not to be a false pretence, within the statute of George 2 [citing *Rex v. Goodhall*]; and the same rule is distinctly recognized in Massachusetts. *Commonwealth v. Drew*, 19 Pick. 179 (Mass. 1837).”

Wharton, *American Criminal Law*, 543 (1st ed. 1846).

The Massachusetts decision cited by Wharton in turn relies upon *Rex v. Goodhall* in holding that “The pretence must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence.” (19 Pick. 179, 185.)

Thereafter the rule enunciated by *Rex v. Goodhall*, *Commonwealth v. Drew* and Wharton spread to the

majority of the states as settled law on the subject, with little independent examination of the reasoning behind it.

The situation today is one in which American courts have mechanically followed an earlier misconception which should be abandoned and has been abandoned by some of the courts from which the supposed rule was adopted.

- (2) **There is no logical basis for making a distinction between a state of mind and other present facts, with regard to false pretenses.**

It is hardly disputable that the state of a man's mind is a fact, and that it can be the subject of a misrepresentation. When such misrepresentation occurs, it relates to an existing fact as clearly as if the false statement had referred to the quantity, quality, or ownership of concrete objects. The fact that in one instance the falsely represented thing is a material object and in the other it is an abstract thing does not make them essentially different. They are present facts in each instance, and are identical in both their illegal purpose and their effectiveness in perpetrating a fraud.

No distinction has ever entered the analogous area of the civil law relating to tort actions for deceit. One who fraudulently misrepresents to another that he or a third person intends to do or not to do a particular thing is civilly liable to a person who justifiably relies on the misrepresentation and is injured thereby. *Restatement of Torts*, Sec. 530. The author appropriately

states in comment (a), under the cited section, that “the state of a man’s mind is as much a fact as the state of his digestion.”

Judge Edgerton’s dissenting opinion in the case of *Chaplin v. United States*, D.C. Cir., 1946, 157 F2d 697, 699-701, is also noteworthy in this regard.

“ . . . No doubt a promise is commonly an undertaking, but it is always an assertion of a present intention to perform. ‘I will’ means among other things ‘I intend to.’ It is so understood and it is meant to be so understood. Intention is a fact and present intention is a present fact. A promise made without an intention to perform is therefore a false statement about a present fact. This factual and declarative aspect of a promise is not a new discovery. It has come to be widely recognized in civil actions for deceit.

In criminal cases most courts and text writers have clung to an old illusion that the same words cannot embody both a promise and a statement of fact. But this tradition that in a criminal case ‘the statement of an intention is not a statement of an existing fact’ has begun to break down.”

- (3) There are no special circumstances or practical considerations which require that misrepresentation of a state of mind be treated differently than misrepresentation of other existing facts.**

Judge Clark cites the danger of injustice in prosecuting acts “as consonant with ordinary commercial default as with criminal conduct” in *Chaplin v. United States*, 157 F2d 697, 698-699. His reasoning is quoted in appellant’s brief (pp. 9-11). But the fal-

lacy of the majority opinion is forcefully brought out in Judge Edgerton's dissent, 157 F2d 697, 701:

“The court's picture of a flood of indictments against honest businessmen is unconvincing. No such flood has been observed in the few jurisdictions which have adopted the modern rule. It is true that innocent men are sometimes accused of crime. Innocent men have been convicted of murder. As long as rape is a crime, intercourse which is actually voluntary or even entirely imaginary will sometimes be charged and even punished as rape. Since it is impossible to prevent occasional miscarriage of justice, every criminal statute jeopardizes innocent people in some degree. The court suggests that the law should not jeopardize legitimate business. But this is the unavoidable price of public protection against illegitimate business. If the suggestion is sound the anti-trust law, the pure food law, the child labor law, the law against receiving stolen goods, and many others should be repealed, for malicious and damaging charges and erroneous convictions are possible under all of them.”

Pearce reports in his previously cited article, 101 U. of Pa. L. Rev. 967, at 1007, that replies to inquiries sent to Better Business Bureaus in nine major cities of five states which follow the minority view, either by judicial construction or by statute, brought a unanimous denial of knowledge that the evils mentioned by Judge Clark in the *Chaplin* case actually exist. The “flood of complaints” has failed to materialize.

Furthermore, Judge Clark's reasoning necessarily conflicts with the judgment of Congress in enacting

the Federal Mail Fraud Statute,² 17 Stat. 283, 323 (1872) and the Supreme Court's construction of that Statute in *Durland v. United States*, 161 U. S. 306 (1896). In its original wording, the statute applied to the use of the mails in the execution of "any scheme or artifice to defraud." The government submits that this language is no more suggestive of false promises than is "any false pretenses," as found in the statute now in use, but nevertheless Congress rejected the argument that only false statements as to past or existing facts were contemplated, and held that "Some schemes may be promoted through mere misrepresentations and promises as to the future, yet are nonetheless schemes and artifices to defraud." 161 U. S. at p. 313. It was only by the amendment of 1909 (35 Stat. 1130), in which Congress adopted the construction of the *Durland* case, that the Act unequivocally was made applicable to all false representations, whether past, existing or future. It then read:

" . . . whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . "

Whatever conclusion might be taken from the interpretation of the original Mail Fraud Act in the *Durland* case, one fact is inescapable—that neither Congress nor the Supreme Court regarded the danger of unjust convictions so great that the defrauding of

²18 U.S.C. 1341, 1342.

others by falsely representing one's intention should be entirely free from prosecution. The same may be said of the legislatures in those states which, although they subscribe to the majority rule, have broadened their criminal fraud provisions by statute to include false promises. See:

Nebraska Rev. Stat., 28-1207 (Supp. 1947);

New Jersey Stat. Ann., 2A:111-1 (1952);

State v. Kaufman, 18 N.J. 75, 112 A (2d) 721 (1955);

Gen. Code of Ohio, Sec. 12447-1;

State v. Singleton, 85 Ohio App. 245, 87 NE (2d) 358 (1949);

La. Stat. Ann., Rev. Stat. 14:67 (1942);

State v. Dabbs, 228 La. 960, 84 So. (2d) 601 (1955).

Even counsel for the appellant shows no particular aversion to the punishing of fraud by false promises, provided it is made criminal by statute. (Appellant's brief, pp. 12, 16.)

The threat of injustice is clearly a rationalization rather than a valid reason for excluding misrepresentation of a state of mind from false pretenses. The burden on the prosecution to prove its case beyond a reasonable doubt is an adequate safeguard for those who innocently become unable to fulfill the terms of their contracts. In a civil action for deceit, the intention of the promisor not to perform a contract cannot be established solely by proof ^{of} its non-performance. Restatement of Torts, Sec. 530, comment (c). *A fortiori*, criminal prosecutions for defrauding by false

promises could not result in conviction without substantial independent evidence of a fraudulent intent.

(4) There are a substantial number of well-reasoned cases in accord with the holding of the trial court in the case at bar.

In support of the interpretation of "false pretenses" advocated by the government and adopted by the trial court in this case, reliance is placed on the reasoning in decisions of the Supreme Courts of California, Rhode Island, and Massachusetts, the latter state having retreated from its original position in *Commonwealth v. Drew, supra*.

The leading case in California is *People v. Ashley*, 42 Cal. 2d 246, 267 P2d 271; cert. denied 348 U.S. 900. Defendant, the business manager of "Life's Estate, Ltd.," a corporation chartered for the purpose of "introducing people," was convicted of grand theft under Sec. 484 of the California Penal Code, which section includes the offense of defrauding a person "by any false or fraudulent representation or pretense." He was specifically charged with defrauding two women of the total sum of \$25,260 by inducing them to make loans to Life's Estate under the misrepresentation that he intended to use the money for purchasing a theatre. Both women were assured that they would be given adequate security. In each instance, however, no security was in fact given, and the loans were used to pay the operating expenses of the corporation.

The Supreme Court ruled that the misrepresentations of intention were false pretenses and affirmed the conviction. The decision contains a valuable discus-

sion of the merits of the two views. 267 P.2d 271, 279-283.

The two California cases cited by the appellant, (p. 12, appellant's brief) require a brief comment. *People v. Weitz* (Cal. App. 1953) 255 P.2d 40, a decision of the Third District Court of Appeal supported the appellant's contentions and held that false statements of intent were not false pretenses, but the Supreme Court of California in affirming the conviction, disapproved this ruling and cited its decision in the *Ashley* case. 267 P.2d 295, 298; certiorari denied 347 U. S. 993.

In the second case, *People v. Ames*, (Cal. App. 1943) 143 P.2d 92, the government contends that the appellant is mistaken in interpreting the misrepresentations to be a combination of past and existing facts and statements of intention. An examination of the facts reveals that only statements of intention were involved.

In *State v. McMahan*, 49 R. I. 107, 140 A. 359 (1929), the defendant was accused of fraudulently contracting for the purchase of cars on six different occasions between August and October, 1926, in each instance making a small down payment and giving a 60 or 90-day note for the balance of the purchase price, which was not paid. The jury concluded from the evidence that the defendant had no intention of performing the contracts at the time he entered into them, and the Supreme Court of R. I. affirmed the conviction, stating:

“This state is committed to the doctrine that in an action for deceit, intention not to meet a future obligation is a question of fact to be submitted to the jury, and that misrepresentation of a present state of mind as to such intention is a false representation of an existing fact.”

Among the Massachusetts cases, *Commonwealth v. Morrison*, 252 Mass. 116, 147 N.E. 588 (1925), involved a scheme whereby one member of a conspiracy offered a merchant some samples of an obsolete spark plug, representing them to be of merchantable quality. A second conspirator placed an order for a quantity of the spark plugs to be delivered C.O.D. to an address in another city, thus inducing the merchant to purchase the spark plugs from the first conspirator. The first conspirator then supplied the merchant's needs and received cash payment. The C.O.D. shipment was subsequently returned unclaimed, and the defendants were prosecuted for obtaining money by false pretenses. Following a conviction the Supreme Court affirmed and stated:

“When a person enters into a contract to buy goods, he impliedly represents that he intends to make a genuine contract; if such is not his intentions, he may be found to have made a false representation . . . ” 147 N.E. 588, 590.

The same court later observed in the case of *Commonwealth v. McKnight*, 289 Mass. 530, 195 N.E. 499, 506, appeal dismissed 296 U. S. 660, that:

“The definition of a false pretense . . . is a representation of some fact or circumstance cal-

culated to mislead which is not true. A man's intention is a matter of fact, and may be proved as such."

The most recent Massachusetts case is *Commonwealth v. Green*, 326 Mass. 344, 94 N.E. (2d) 260 (1950), wherein the defendant was charged with having solicited funds for a proposed investment trust, but with the actual intention of converting the money to his own use. In affirming a conviction, the court held:

"The representations that the moneys contributed were to be invested in this fund were statements of fact as to the intention of those collecting for the fund."

(5) **The Ninth Circuit, Oregon, and Alaska cases cited by appellant did not involve the situation now before the court. The case is one of first impression in this jurisdiction.**

The cases which appellant cites as persuasive authority for the adoption of the majority rule in this jurisdiction are easily distinguishable, and serve to emphasize the difference between falsely representing one's present intention and merely stating an opinion concerning a future event.

The indictment in *United States v. Pearce*, 7 Alaska 246 (1924) charged that in May, 1923, Edward E. Pearce falsely represented to Robinson & Greenberg, a mercantile copartnership, that he had sufficient funds on deposit with the Miners & Merchants Bank of Alaska to pay for all goods which he *might* order during the 1923 mining season. Obviously the statement amounted to a prediction that the amount on

deposit would be sufficient, and it was contingent on the quantity of goods he ordered in the future. The court was unquestionably correct in dismissing the indictment.

Biddle v. United States, 9 Cir. 1907, 156 Fed. 759, arose in the United States District Court for China. The defendant contracted to rent the second floor of a certain building to others for the purpose of gambling during the autumn race meeting of 1906 in Shanghai. One of the assurances made by the defendant was that the games would be allowed to operate, although in fact there was a municipal ordinance against gambling in Shanghai at that time. The defendant obtained the rent, but his efforts to have the ordinance suspended were not successful. There was no representation that the ordinance had been suspended or revoked, however. The conviction was set aside because the defendant's promise was nothing more than a prediction.

The case of *State v. Leonard*, 73 Ore. 451, 144 Pac. 113 (1914), applying the Oregon statute from which 65-5-81, ACLA 1949, was taken, did not involve false promises or statements of intention. The defendant, who owned a remote tract of barren land, procured one O'Donovan to execute a \$4,500 note and mortgage which recited that it constituted half the purchase price of the property. He then falsely represented to one Denney that he had recently sold the land for \$9,000, and that the property had such improvements as a house and an orchard, thereby inducing Denney to exchange a more valuable piece of property for the

note and mortgage. The jury returned a verdict of guilty and the conviction was affirmed by the Supreme Court. Therefore, the statement quoted from this case at p. 15 of appellant's brief is only *obiter dicta* in nature.

(6) The trial court's ruling is logically and practically sound. No error has been shown.

In adopting the view that a false statement of intention is a false pretense, the trial court made a policy choice which is logically sound and supported by strong practical reasons. In addition, it had the advantage of deciding the issue in the full light of the local circumstances.

Error is not to be presumed, but must be affirmatively shown by the appellant, and the government submits that nothing more has been shown than the fact that more jurisdictions are contrary to the trial court than are in accord with it on this particular matter. Every intendment should be in favor of the lower court's judgment.

Merryman v. Bourne, 76 U.S. 592, 600 (1869);
Hardt v. Kirkpatrick, 9 Cir., 1937, 91 F.2d 875,
 878, cert. den. 303 U. S. 626.

CONCLUSION.

Misrepresentation of present intent is a misrepresentation of an existing fact, and therefore it is within the purview of 65-5-81 ACLA 1949, defining the crime of Obtaining Money by False Pretenses. The trial

court was correct in refusing to dismiss the Indictment, and the judgment of conviction should be affirmed.

Dated, Juneau, Alaska,
February 10, 1958.

ROGER G. CONNOR,

United States Attorney,

JEROME A. MOORE,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15826

United States
Court of Appeals
for the Ninth Circuit

CECIL M. JACKSON, Bankrupt,
Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M.
Jackson, Bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN 22 1938

PAUL P. HENNING, CLERK

No. 15826

**United States
Court of Appeals**
for the Ninth Circuit

CECIL M. JACKSON, Bankrupt,
Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M.
Jackson, Bankrupt,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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BANKRUPTCY PETITION

(Schedule B-5—Page 15)

**Property Claimed as Exempt from the Operation
of the Act of Congress Relating to Bankruptcy**

(N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

Valuation

Homestead of petitioner and wife in joint tenancy at 306 Avondale Ave., County of Los Angeles, Los Angeles, California, described as: "Lot 2, Block 8 of Brentwood Park, City of Los Angeles. Also that portion of Avondale Avenue and Hanover Street vacated by Ordinance 41346 new series of said City, adjoining said Lot 2 on the Northwest, bounded on the North by the Southerly line of said Hanover Street, as now established, 75 feet wide and on the West by the Easterly line of said Avondale Avenue, as now established, 75 feet wide as per map recorded in Book 9, Pages 10 and 11 of Maps in the office of the Recorder of said County." Under Calif. Civil Code §1237-1260.....

\$3,525.96

Earnings of petitioner within last 30 days, under Calif. C.C.P. §690.11.....	30.00
Household goods and furniture, household stores, wearing apparel, etc., under Calif. C.C.P. §690.2.....	2,000.00
Pictures painted by petitioner's son and personal books of petitioner, under Calif. C.C.P. §690.1.....	120.00
\$1,000 life insurance policy with Prudential Ins. Co., with wife as beneficiary. Premiums \$25 yearly, no cash surrender value, under Calif. C.C.P. §690.19.	
2 \$10,000 life insurance policies with Occidental Life Ins. Co., on life of petitioner with wife as beneficiary. Premiums of \$50 and \$62 monthly = \$120. Petitioner has borrowed \$2,000, no cash surrender value—to the extent as allowed by law.	
Total	\$5,675.96

/s/ CECIL M. JACKSON,

Signature of Petitioner. [2*]

In the United States District Court for the Southern
District of California, Central Division

In Bankruptcy No. 73351—TC

In the Matter of :

CECIL M. JACKSON.

TRUSTEE'S REPORT OF
EXEMPT PROPERTY

To David B. Head, Referee in Bankruptcy :

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above-entitled proceeding.

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption :

Property claimed to be exempt by State laws, with reference to the statute creating the exemption :

None

Estimated Value

C. C. P. 690.2—Household goods and furniture household stores, wearing apparel	\$2,000.00
C. C. P. 690.1—Pictures and books	120.00
C. C. P. 690.19—\$1,000 life insurance policy with Prudential Ins. Co.	

Trustee refuses to exempt the real property described as Lot 2, Block 8 of Brentwood Park, City of Los Angeles, and that portion of Avondale Avenue and Hanover Street vacated by Ordinance 41346 New Series, adjoining said Lot 2, on the ground that the Declaration of Homestead is improper in that the same does not contain a description of the property.

Trustee refuses to exempt two \$10,000 insurance policies with Occidental Life Insurance Company, on the ground that bankrupt's schedules do not clearly show the annual premium on said policies of insurance.

Dated this 22d day of August, 1956.

/s/ A. S. MENICK,
Trustee.

[Endorsed]: Filed Aug. 23, 1956. [3]

[Title of District Court and Cause.]

**BANKRUPT'S OBJECTIONS TO TRUSTEE'S
DETERMINATION OF EXEMPT PROPERTY**

To the Honorable David B. Head, Referee in
Bankruptcy:

Cecil M. Jackson, the above-named bankrupt, objects to the determination by the Trustee of property designated and set forth by him as exempt in the Trustee's report of exempt property, dated August 22, 1956, in the following particulars:

1. The Trustee has refused to set aside as exempt two \$10,000.00 insurance policies with the Occidental Life Insurance Company, as to which policies there is no known cash surrender value at the present time. The schedules have set forth that the premiums on these two policies are \$50.00 per month and \$62.00 per month, respectively, or a total of \$600.00 and \$744.00 annually, respectively.

2. That said policies inure to the benefit of the bankrupt's spouse within the meaning of §690.19 of the Code of Civil Procedure of the State of California.

3. That under and by virtue of the terms of §690.19 of the Code of Civil Procedure of the State of California, both of said policies are exempt to the proportion that \$1,000.00 bears to [4] the total annual premiums thereon.

4. The Trustee has refused to set aside as exempt the real property owned by the bankrupt and his wife in joint tenancy, at 306 Avondale Avenue, Los Angeles, California, on the ground that the Declaration of Homestead thereon is improper in that the same does not contain a description of the real property.

5. That the subsisting Declaration of Homestead of the bankrupt does contain a sufficient reference to, and description of, the property claimed as exempt so that the same may be identified within the meaning of the requirements of the exemption statutes of the State of California.

Wherefore, your petitioner prays that this Court determine that your petitioner is entitled to the exemption of the two \$10,000.00 insurance policies with Occidental Life Insurance Company to the full extent provided by the exemption laws of the State of California, and that your petitioner is entitled to have set aside as exempt the real property located at 306 Avondale Avenue, Los Angeles, California, as a homestead of the bankrupt, and his wife, and that the Trustee be ordered and required to designate the said insurance policies and the said real property, and set the same aside for your petitioner as exempt, and that your petitioner have such other and further relief as is just.

/s/ CECIL M. JACKSON,
Bankrupt.

/s/ IRVING SULMEYER,
Attorney for Bankrupt.

This may be filed late—verbal extension of time was granted.

/s/ DAVID B. HEAD,
Referee.

Duly verified.

[Endorsed]: Filed Sept. 6, 1956. [5]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF BANKRUPT'S OBJECTIONS TO TRUS-
TEE'S DETERMINATION OF EXEMPT
PROPERTY

To the Honorable David B. Head, Referee in Bank-
ruptcy:

Facts

Bankrupt recorded on May 21, 1954, a document entitled "Declaration of Homestead." Hereafter this Declaration of Homestead will be referred to as the document for purposes of brevity.

The document recorded by the bankrupt was completely filled out in all respects except paragraph three of said document did not contain the description of the property sought to be homesteaded. It is the understanding of the bankrupt that the exemption provided by the homestead statutes of the State of California has been disallowed by reason of the absence of the description of the bankrupt's property in said document.

In determining whether the document by reason of which the bankrupt claims the homestead exemption allowed by the laws of the State of California, is legally sufficient and therefore the refusal to allow the exemption was improper, we must examine [7] various aspects of those laws and the decisions passing on the points herein involved.

It is the contention of the bankrupt that the docu-

ment by reason of which he claims the homestead exemption was legally adequate. His contention is based on the following reasons:

1. The purpose and nature of the homestead legislation requires that a court reviewing or passing on the legal sufficiency of a homestead should give liberal construction to their interpretation that their purposes may be carried out to the benefit of the party or parties claiming the homestead.

2. The entire document here under consideration must be examined to determine its legal sufficiency.

3. The reference in the document here under consideration to the abandonment of homestead recorded on a specific date is a reference sufficiently certain to identify a document containing a full description of the property, and thus cure any defect in the document.

4. Parol evidence should be admitted to supply the insufficient description.

I.

The Purpose and Nature of the Homestead Legislation Requires That a Court Reviewing or Passing on the Legal Sufficiency of a Homestead Should Give Liberal Construction to Their Interpretation That Their Purposes May Be Carried Out to the Benefit of the Party or Parties Claiming the Homestead.

Homestead laws are predicated on public policy, their purpose being to promote a healthy social order

and to prevent insolvent persons from becoming homeless.

Schmidt vs. Denning,
117 Cal. App. 36;

Phelps vs. Loop,
64 Cal. App. (2d) 332;

Rich vs. Ervin,
86 Cal. App. (2d) 386. [8]

The homestead laws are intended for the benefit of the debtor rather than the creditor.

Simonon v. Burr,
121 Cal. 582.

The homestead laws are given a liberal construction in order to advance their beneficial objects and carry out the manifest purpose of the Legislature.

Greenlee v. Greenlee,
7 Cal. (2d) 579;

Johnson v. Brauner,
131 Cal. App. (2d) 713;

Oktanski v. Burn,
138 Cal. App. (2d) 419.

II.

The Entire Document Here Under Consideration
Must Be Examined to Determine Its Legal Suf-
ficiency

The document here considered contains a state-
ment that Cecil M. Jackson, his wife and two chil-

dren are residing on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, which they claim as a homestead, and further the value of this property sought to be homesteaded is set forth as being Twenty-seven Thousand Dollars. This document then contains a reference to "the" former declaration of homestead abandoned on or about March 12, 1954. An additional paragraph furnishes the information that the homestead property contains a six room residence and garage.

In determining the legal sufficiency of this document we must examine it in its entirety to determine it if refers anywhere to another document which will furnish additional information to complete the legal description.

Ritchie vs. Anchor Casualty Co.

135 Cal. App. (2d) 245, 251.

Paragraph six does refer to an abandonment of homestead carried out on a specific date. It is submitted that if the abandonment of homestead of March 12, 1954, contains an adequate description the document here considered is legally sufficient. [9]

III.

The Reference in the Document Here Under Consideration to the Abandonment of Homestead Recorded on a Specific Date Is a Reference Sufficiently Certain to Identify a Document Containing a Full Description of the Property, and Thus Cure Any Defect in the Document.

The question as to whether a reference to another document is adequate to supply an otherwise insufficient description has been considered many times by California courts.

The description in a declaration of homestead need not be more particular than in a conveyance.

Ornbaum vs. Creditors,
61 Cal. 455;

Jones vs. Gunn,
149 Cal. 689.

In the case of Matter of the Estate of Caroline Ogburn, 105 Cal. 95, the description of the property sought to be homesteaded was as follows:

“Western part of lot No. 5 of said village as laid out by F. S. Freeman’s Division of said village, the same being 37 feet front on Main Street of said village, and extending back with parallel lines one hundred and ninety feet deep, it being a part of the southeast $\frac{1}{4}$ of section 21, in Township No. 10 of range 2 east.”

It was contended by the appellants that this description was void as there was nothing to show the location of lot 5. The court held that the declaration of homestead stated that the family resided upon the lot sought to be homesteaded, and this statement, together with such description which followed clearly enough designated the premises intended to be claimed as a homestead.

The above case is cited with approval in the case of *Donnelly vs. Tregaskis*, 154 Cal. 261, at page 263, where the court stated:

“In this discussion we do not mean to be understood [10] as holding that to make a sufficient description a deed must refer to a map actually of record. We do mean, however, to declare the unquestioned rule that where a description is dependent for its sufficiency upon some instrument, such as a map, the map, property identified must be produced, or in some manner established, or the description must fail.”

A reference to a document previously recorded containing the description of property is adequate to furnish the legal description if there is such a document on record.

Marcone vs. Dowell,
178 Cal. 396.

An examination of the Los Angeles County Recorder's office for March 12, 1954, will reveal that an abandonment of homestead was recorded by Cecil M. Jackson and Edith Jackson. Said Abandonment of Homestead has a full description of the property formerly homesteaded. The Abandonment of Homestead refers to an earlier Declaration of Homestead recorded Jan. 22, 1951, in Book 35373, Page 293 of the Official Records of the County Recorder of Los Angeles County, California. An examination of the earlier Declaration of Homestead recorded on January 22, 1951, reveals the

property homesteaded at that time was valued at \$27,000, was the residence of Cecil M. Jackson and Edith E. Jackson and was a six-room residence.

It may be argued that the reference to the abandonment of homestead refers to another tract or piece of land. However, this argument was considered in the case of *Joyce vs. Tomasini*, 168 Cal. 234, where a contract to execute a lease for certain land only described the land by giving the names of individuals who lived on each side of it. The court allowed extrinsic evidence to be admitted to establish the exact description of the land. In response to the argument that there might be another tract of land of the same acreage, either in the county where the land was [11] alleged to be located or elsewhere, that was bounded by other lands belonging to the same persons as named, the court held that if such a coincidence existed it was incumbent upon the defendant to plead and prove it. The court held further that in the absence of such proof it will be presumed, upon the other facts shown, that these boundaries do identify the tract.

The foregoing indicates that the reference to the abandonment of homestead on March 12, 1954, is a reference to a document of record that can be definitely ascertained, that the document referred to contains an adequate legal description to ascertain the property sought to be homesteaded by the bankrupt herein.

IV.

Parol Evidence Should Be Admitted to
Supply the Insufficient Description

As pointed out above in determining the adequacy of the description in a homestead declaration the same rule should be applied as in conveyances.

Ornbaum vs. Creditors,
61 Cal. 455.

Where the terms used in a deed to show the description are equivocal, ambiguous or insufficient the subsequent acts of the parties while in interest may be resorted to for the purpose of ascertaining their intention.

Truett vs. Adams,
66 Cal. 218.

The subsequent residence by Mr. and Mrs. Jackson on the same property sought to be homesteaded is such acts as come within the purview of the case last cited above wherein parol evidence should be admitted to cure the insufficient description.

It is respectfully submitted that for the foregoing reasons the homestead exemption should be allowed.

IRVING SULMEYER and
EUGENE S. IVES,

By /s/ EUGENE S. IVES,
Attorneys for Bankrupt.

[Endorsed]: Filed Oct. 2, 1956. [12]

[Title of District Court and Cause.]

MEMORANDUM BY REFEREE RE OBJEC-
TIONS TO TRUSTEE'S REPORT OF EX-
EMPT PROPERTY

In his schedules the bankrupt claimed exemption of a homestead on a certain parcel of real property. The trustee refused to set aside the property as exempt and the bankrupt filed objections to the trustee's report of exempt property. The trustee contends that the homestead is void and of no effect for the reason that no description of the property claimed as a homestead is found in the declaration. This is the only issue involved.

The facts are not disputed. The bankrupt was living with his family on the property claimed as exempt on May 21, 1954, the date of the recording of a Declaration of Homestead by the bankrupt and his wife. The homestead declaration (Exhibit 1) states as follows:

“* * *

“(3) They are now residing on the land and premises located in the City [13] of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:

“(No description of the premises is set out.)

“* * *

“(6) No former declaration of homestead has been made by them, or by either of them, except as follows:

“The former declaration of homestead was abandoned on or about March 12, 1954.

“(7) The character of said property so sought to be homesteaded, and the improvement or improvements which have been affixed thereto, are as follows: six-room residence and garage.

“* * *”

It appears that on March 12, 1954, the bankrupt and his wife filed an Abandonment of Homestead (Exhibit 2) which described the property upon which homestead was abandoned as follows:

“Lot 2 in block 8 of Brentwood Park, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 9, page 10 of Maps, in the office of the county recorder of said county.

“Also that portion of Avondale Avenue and Hanover Street, vacated by Ordinance No. 41346 (New Series of said City), adjoining said lot 2 on the northwest, [14] bounded on the north by the southerly line of said Hanover Street, as now established, 75 feet wide, and on the west by the easterly line of said Avondale Avenue, as now established, 75 feet wide.

“Commonly known as 306 Avondale Avenue, Los Angeles, California.”

The first Declaration of Homestead (Exhibit 3) which was abandoned gave the same description, excepting the street address.

These facts state a situation which is without precedent in the reported cases. The statute, Section 1263, California Civil Code, makes mandatory that the declaration of homestead must contain, among other requirements:

“3. A description of the premises.”

The case of *Donnelly v. Tregaskis*, 154 Cal. 261, is helpful in our present situation. The Court said therein, at page 263:

“* * * A description of the premises necessarily means such description as will serve to identify the property. To uphold homesteads, which are favored by the law, great liberality in this respect will be allowed, but the rule nevertheless obtains in full force, that the description must be sufficient so that the property may be identified in some legitimate manner * * *”

Again, on page 264:

“* * * We do mean, however, to declare the unquestioned rule that where a [15] description is dependent for its sufficiency upon some other instrument, such as a map, the map, properly identified, must be produced, or in some manner established, or the description must fail. * * *”

See also *In re Ogburn*,
105 Cal. 95.

In construing the declaration of homestead in this case, I am required to consider the whole document and all that is contained within its four corners.

Paragraph (6) of the declaration, which refers to the abandonment of a prior declaration, falls under the permissive, as distinguished from the mandatory provisions of Section 1263, Civil Code. It is comparable to a recital in a deed, which may be referred to give certainty to an instrument. The recording of a homestead is for the purpose of giving notice of the declarant's claim. A person searching the records of the County Recorder's Office would find the declaration of May 21, 1954. He would not find a description of the property in that document. He would find a reference to an abandonment of homestead "on or about March 12, 1954." Then through the proper index he would find the abandonment. The abandonment would give him a complete description of the property. And then if he went out to examine the property he would have found the bankrupt and his family living on the property, and that there was a six-room house and a garage on the premises.

The courts of California have held that the homestead statutes, being of a remedial and humane character, should be given a liberal construction.

Schuyler v. Broughton,

76 Cal. 524;

Southwick v. Davis,

78 Cal. 504.

However, the mode in which a homestead is to be created, as [16] well as the legal incidents which attach to its existence, are purely statutory.

Security Loan & Trust Co. v. Kauffman,
108 Cal. 214, at 219.

The mandatory provisions of the statute must be substantially complied with to make valid a declaration of homestead.

Ashley v. Olmstead,
54 Cal. 616.

This case is not so concerned with strict or liberal construction of the statute as with the factual question of whether or not the instrument sufficiently describes the property claimed as a homestead to meet the intent and purpose of the statute.

I reach the conclusion that the reference in the declaration to the previously recorded document is sufficient to supply a valid description under the statute. It is sufficient to give notice of the claim and that is the purpose for the recording of the instrument.

Counsel for the objecting bankrupt shall prepare, serve and file proposed findings, conclusions and order in conformity with this opinion. Local Rule 7 (a).

Dated: November 30, 1956.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 30, 1956. [17]

In the District Court of the United States for the
Southern District of California, Central Division

No. 73,351-TC

In the Matter of:

CECIL M. JACKSON,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER RE HOMESTEAD EX-
EMPTION

At Los Angeles in Said District on the 8th Day of
December, 1956:

This matter came on to be heard before the under-
signed Referee in Bankruptcy on October 2, 1956,
in his Courtroom, Room 340, Federal Building, Los
Angeles, California, upon the bankrupt's objections
to the Trustee's determination of exempt property.

A. S. Menick, Trustee in Bankruptcy, appeared
by and through his Attorneys, Craig, Weller &
Laugharn, by C. E. H. McDonnell. The bankrupt
appeared by and through his Attorneys, Irving
Sulmeyer and Martin J. Kirwan.

The Court having heard the statements of counsel
and their citation of authority, and having taken the
matter under submission, and being fully advised in
the premises, does hereby make its Findings of Fact,
Conclusions of Law, and Judgment as follows:

Findings of Fact

1. On May 21, 1954, Bankrupt and his wife duly recorded [18] a Declaration of Homestead (Exhibit 1). That on said May 21, 1954, the bankrupt was living with his family on the property claimed as exempt.

2. The Homestead Declaration (Exhibit 1) states as follows:

“ * * *

(3) They are now residing on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:

[No description of the premises is set out.]

* * *

(6) No former declaration of homestead has been made by them, or by either of them, except as follows:

The former declaration of homestead was abandoned on or about March 12, 1954.

(7) The character of said property so sought to be homesteaded, and the improvement or improvements which have been affixed thereto, are as follows: six-room residence and garage.

* * *”

3. That on March 12, 1954, the bankrupt and his wife filed an abandonment of homestead (Ex-

hibit 2), which described the property on which the homestead was abandoned as follows:

“Lot 2 in block 8 of Brentwood Park, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 9, page 10 of [19] Maps, in the office of the County Recorder of said county.

“Also that portion of Avondale Avenue and Hanover Street, vacated by Ordinance No. 41346 (New Series of said City), adjoining said Lot 2 on the northwest, bounded on the north by the southerly line of said Hanover Street, as now established, 75 feet wide, and on the west by the easterly line of said Avondale Avenue, as now established, 75 feet wide.

“Commonly known as 306 Avondale Avenue, Los Angeles, California.”

4. The first Declaration of Homestead (Exhibit 3) which was abandoned gave the same description, excepting the street address, as was shown in the Abandonment of Homestead.

5. That from and after May 21, 1954, bankrupt and his family were living on the property claimed as exempt herein, and that said property contains thereon a six-room house and a garage.

Conclusions of Law

That the Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954, contains a sufficient and valid description of the real property

claimed as exempt, under the provisions of the California Homestead Statutes.

The Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954, is valid as against the Trustee in Bankruptcy.

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged, and Decreed that the objections of bankrupt to the Trustee's determination of exempt property is [20] sustained and it is

Further Ordered, Adjudged, and Decreed that the real property described as

Lot 2 in block 8 of Brentwood Park in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 9, page 10 of Maps, in the office of the County Recorder of said county.

Also that portion of Avondale Avenue and Hanover Street, vacated by Ordinance No. 41346 (New Series of said City), adjoining said Lot 2 on the northwest, bounded on the north by the southerly line of said Hanover Street, as now established, 75 feet wide, and on the west by the easterly line of said Avondale Avenue, as now established, 75 feet wide, which real property is commonly known as 306 Avondale Avenue, Los Angeles, California,

be and the same is hereby designated and set apart to be retained by the bankrupt as his own property,

under the provisions of the Act of Congress relating to bankruptcy, as his exemption duly allowed by law and claimed by him in the above-entitled proceedings.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Affidavit of service by mail attached.

[Endorsed]: Filed January 8, 1957. [21]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of A. S. Menick, the duly elected, qualified and acting trustee in the within bankruptcy proceedings respectfully shows:

I.

That on the 8th day of January, 1957 your Honor made and entered Findings of Fact, Conclusions of Law and order denying the report of exempt property of the trustee, sustaining the objections thereto filed by the bankrupt and setting aside to the bankrupt as exempt certain real property as is more particularly set forth in the said Findings of Fact, Conclusions of Law and Order, which is attached hereto, marked Exhibit A and made a part hereof.

II.

The trustee respectfully contends that the Findings of Fact are erroneous and not supported by the evidence in the following particulars: The said Findings in paragraph 1 recites that on May 21, 1954, the bankrupt and his wife duly recorded a [23] declaration of homestead. That on May 21, 1954, the bankrupt was living with his family on the property claimed as exempt. The trustee contends that the said declaration of homestead referred to as Exhibit 1 in the said proceedings was not a valid, legal or sufficient instrument to qualify as a declaration of homestead in that the same as made, executed and recorded contained no legal description or address whatsoever of the said premises purportedly claimed as exempt. The trustee also contends that the Conclusions of Law were erroneous and improperly made upon the said evidence when the same concluded that the said declaration of homestead recorded by the bankrupt and his wife on May 21, 1954, contained a sufficient and valid description of the real property claimed as exempt under the provisions of the California Homestead Statutes in that there was absolutely no description set forth therein in the said declaration of homestead as executed and as recorded, and accordingly the further conclusion that the said declaration of homestead is valid as against the trustee is erroneous.

Trustee likewise contends that the order made by the Referee on January 8, 1957, which decreed

that the objections of the bankrupt to the trustee's determination of exempt property (the trustee refused to set the said property aside as exempt) was sustained and determining that the real property as described in the said order was designated and set apart to be retained by the bankrupt as his own property and as his exemption was erroneous in that the bankrupt had no declaration of homestead recorded which complied with the provisions of Section 1263 of the Civil Code of the State of California.

Your trustee contends that the said purported declaration of homestead, devoid of any description of the said premises other than a recitation that the same is a six-room residence and garage, and the further statement that no former declaration of homestead had been made except that the former declaration of homestead was [24] abandoned on or about March 12, 1954, does not provide in any manner sufficient description of the said premises to comply with the said Section and/or constitute the said document a valid declaration of homestead.

Wherefore, your petitioner prays that your Honor certify to the Judge of this court and transmit to the Clerk the record in the within proceedings, including the trustee's report of exempt property, the objections thereto, the Findings of Fact, Conclusions of Law and Order of January 8, 1957, the exhibits received by the Referee in connection with the said hearing, and any other papers or documents pertinent thereto; and your trustee further prays

that the said order of January 8, 1957, be set aside and that the trustee be directed to proceed with the administration of the said real property.

/s/ A. S. MENICK,
Trustee in Bankruptcy.

CRAIG, WELLER & LAUGH-
HARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

Affidavit of service by mail attached.

Duly verified.

[Endorsed]: Filed January 18, 1957. [25]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORI-
TIES IN SUPPORT OF TRUSTEE'S PETI-
TION FOR REVIEW

To the Honorable Thurmond Clarke, Judge of the
United States District Court, Southern Dis-
trict of California:

A. S. Menick, the trustee herein, has filed his Pe-
tition for Review of a certain Order made by
Referee David B. Head in the within proceedings
on January 8, 1957, which set aside to the bankrupt
certain real property as exempt and in support

thereof the within Memorandum of Points and Authorities is filed herewith.

Facts:

The facts are simple and uncontested:

The bankrupt seeks to have set aside as exempt to him a homestead. The Findings of Fact refer to the Declaration of Homestead as follows (Exhibit 1):

“(3) They are now residing on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:

“(No description of the premises is set out.)

“* * *

“(6) No former declaration of homestead has been [27] made by them, or by either of them, except as follows: the former declaration of homestead was abandoned on or about March 12, 1954.

“(7) The character of said property so sought to be homesteaded, and the improvement or improvements which have been affixed thereto, are as follows: six-room residence and garage.”

The sole issue is:

Is the Declaration of Homestead sufficient, complete and adequate and does the same meet the requirements of the statute?

The Statute—California Civil Code Section 1263 sets forth the “Formal Requirements” of the Declaration. The present controversy concerns “3. A description of the premises.”

It has been our experience that when a question as to the debtor’s or bankrupt’s imperfect right of exemption arises, the “liberality of construction” is always asserted by the person so claiming the exemption to bridge over or explain the imperfect or legally insufficient exemption. And, in this particular case the Referee in his Memorandum Opinion stated that: “The Courts of California have held that the homestead statutes, being of a remedial and humane character, should be given a liberal construction.”

It is of extreme interest to see just how far this so-called “liberal and humane” doctrine can be stretched. Take, for example, the case of *E. A. Lynch, trustee, vs. Robert L. Stotler*, 215 F. 2d 776. This is the most recent decision of the United States Court of Appeals, Ninth Circuit, on this point, the decision having been rendered on September 27, 1954. In this case in which we represented the trustee, the United States District Judge applied this liberality rule and held that [28] (4) of the “Formal Requirements” of Section 1262 of the Civil Code, i.e., “An estimate of the actual cash value” was met by leaving the answer blank. The decision of the District Judge was reversed.

From the decision at page 778:

“Both parties cite many California homestead cases. Many of these cases tend toward a liberal construction of the California exemption statutes.

“Although homestead exemptions are a creature of statute and not of common law, we are bound to and we do accept the idea that the statute should not be too strictly construed. But where the homestead requires as a condition of its existence the performing of certain acts and some of them have not been performed, we find no California case that would justify us in reading statutory requirements out of the statute. As we have construed the declaration, the bankrupts did little more than say in writing, ‘We want a homestead.’

“We think we are compelled to deny the homestead on the basis of the underlying reasoning of the following California cases: *Rich v. Ervin*, 86 Cal. App. 2d 386, 194 P. 2d 80; *Crenshaw v. Smith*, 74 Cal. App. 2d 255, 168 P. 2d 752; *Schuler-Know Co. v. Smith*, 62 Cal. App. 2d 86, 144 P. 2d 47; *Reid v. Englehart-Davidson Co.*, 126 Cal. 527, 58 P. 1063; *Ames v. Eldred*, 55 Cal. 136; *Ashley v. Olmstead*, 54 Cal. 616.”

The California Courts have likewise held the debtor to a strict construction of the statute with respect to the necessary and so-called “formal requirements.” Failure to state an estimate of the cash value—Homestead void, *Ashley [29] v. Olmstead*, 54 Cal. 616.

Homestead not valid where phrase in Declaration states "does not exceed in value the sum of five thousand dollars." *Southwick vs. Davis*, 78 Cal. 504.

Ignoring the seemingly unimportant point of the "Formal Requirements" of the said Section i.e., "1. The name of the wife," renders the Homestead ineffective and void. *In re Mapes*, 120 F. Supp. 316. This is a 1954 decision of Judge Tolin of this Court affirming the Order of the Referee. From the decision at page 317:

"State exemption statutes generally receive '* * * the most liberal construction which the courts can possibly give them.' * * *

"Of equal dignity with this rule is the sequela that the District Court is bound to accept the State law as it has been declared by the California courts. *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

"In construing a preceding, and very similar, section of the Code, the California Supreme Court said (in 1880) that provisions prescribing what shall be contained in a declaration of homestead are mandatory and not merely directive, and that compliance with them is essential to the validity of the homestead. The Court indicated that although such statutes might be generally subject to a liberal construction, the language 'must contain' is plain and requires no construction. *Ashley v. Olmstead*, 54 Cal. 616."——

A wife's Declaration which does not contain a statement that the husband has not made a Declaration is void. *Strangman v. [30] Duke*, 140 CA 2d 185, February 17, 1956.

Description of Premises

This particular segment of the "Formal Requirements" "(3) The description of the premises," is the heart of the Section. Without it there is no selection.

The nearest approach to a support to the bankrupt's contention that he need not set forth a complete description is the case of *Donnelly v. Tregaskis*, 154 Cal. 261. From the opinion at page 263:

"The declaration of homestead made by the wife set forth that she resided with her family 'on the lot of land and premises situate, lying and being in the city of Vallejo, County of Solano, State of California, bounded and described as follows, to wit: Being lot No. 14 in block No. 266, according to the map of said Vallejo made by C. W. Rowe, surveyor.' A description of the premises necessarily means such description as will serve to identify the property. To uphold homesteads, which are favored by the law, great liberality in this respect will be allowed, but the rule nevertheless obtains in full force, that the description must be sufficient so that the property may be identified in some legitimate manner."

In this case we find at least an effort at description and location.

The most "liberal" case which has come to our attention is the recent case of *Oktanski v. Burn*, 138 CA 2d 419, January 11, 1956. In this case the street address was inserted and the Court held that if the street address was correctly given in the Declaration that the requirement of the [31] Section was met.

In the case of *Jones v. Gunn*, 149 Cal. 687 (cited in the above *Donnelly* case), we find a deficient claim of Homestead exemption wherein the claim was as to "all lands owned by her husband in the township."

From the opinion at page 689:

"These requirements must all appear upon the fact of the declaration, and the omission of any one of them from the declaration is fatal to the claim of homestead, and cannot be supplied by extraneous evidence. (*Read v. Englehart-Davidson, etc., Co.*, 126 Cal. 529 (77 Am. St. Rep. 206, 58 Pac. 1063).)

"Section 1263 C. C. by separate subdivision, provides that the declaration must contain a description of the premises, and this provision would seem to be as mandatory as any of the other provisions of said section."

In that case, as here, the contention was made that by consulting other records the description could be supplied.

The mere fact that the debtor did not set forth in his Declaration that he was living on the prem-

ises, makes the Declaration imperfect and void. *Olds v. Thorington*, 47 Cal. App. 355. From the decision at page 359:

“It will be observed that the declarant declares that he resides on the northwest quarter of Section 28, which, according to the description immediately following in the homestead, consists of three distinct parcels of land, two of which the declarant does not own. He fails to specify, however, on which of those three parcels he was then residing. In other words, it cannot be determined from the declaration whether the declarant was then [32] residing on the thirty-two-foot strip on the east side of the quarter section, or on the thirty-one-rod strip, on the west side of said quarter section, or on the mid parcel which he afterward attempts to select as a homestead. We are of the opinion that such omission is fatal. If the statement of residence, or any of the other statements required to be made by said section, is omitted the homestead is void. Indeed, the supreme court of this state has generally held that homestead claimants must quite strictly comply with the statutory requirements.

“And in *Tappendorff v. Moranda*, 134 Cal. 419 (66 Pac. 419): ‘The right to a homestead and to enjoy the privileges and immunities incident thereto is purely of statutory creation, and exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a home-

stead upon a tract of land is mandatory and cannot be dispensed with.'

"In *Boreham v. Byrne*, 83 Cal. 23 (23 Pac. 212), it was held that where the declarant stated that he was 'in possession' of certain described premises which he claimed as a homestead it was not the equivalent of the required statement of residence.

"The case of *Harris v. Duarte*, 141 Cal. 497 (70 Pac. 298, 75 Pac. 58), was one in which it was shown that a parcel of land on which the declarant resided was not the one described in the declaration, and the court held the error to be fatal, saying: 'A declaration of homestead must contain a description of the premises claimed and a statement that the person making it is residing on the premises [33] described.'

"Respondent further contends for the application of the rule that ambiguity or obscurity in a written instrument may be removed by extrinsic evidence, from which he argues that since the evidence shows that the dwelling was located on the mid parcel the defect in the declaration is cured. The established rule is, however, that the right of a claimant to select a homestead and impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence. (*Read v. Englehart-Davidson Co.*, *supra*; *Boreham v. Byrne*, *supra*.)"

An example of liberality with which we agree is the old case of *Ornbaum v. His Creditors*, 61 Cal.

455 in which case the Declaration has a description as follows:

“Plaintiff filed and had recorded his declaration of homestead in the County of Mendocino; that the homestead was bounded as follows: On the north by Ranchera Creek; on the east by the ranches of Robert Stubblefield and Paddy Adams; on the south by what is known as Redwood Mountains, and on the west by Camp Creek. That said boundary embraced about eleven hundred acres. That at the time said declaration was filed the lands were Government lands of the United States.”

And the Court held that the description was adequate.

In none of the cases involving these situations:

1. Failure to give name of wife;
2. Failure to show residence on property;
3. Failure to show value;
4. Failure to give description; [34]
5. Failure of wife to state that husband had made no Declaration;

was extrinsic evidence allowed.

This rule is obvious and if such extrinsic evidence allowed, a mockery would be made of the requirements of the Section and all that the bankrupt would have to do would be to say, “I have recorded a Declaration of Homestead which recites, ‘I claim a homestead,’ ” and then to prove and establish the same at a later date with further and additional evi-

dence in an attempt to provide the fatal deficiencies.

As between adjoining owners, grantor and grantee, leases and conveyances, we concede that matters of intent and imperfect descriptions by reference to maps and other extrinsic evidence can be later supplied. But, most certainly, this is not the rule with respect to statutory Declarations of Homestead.

Carey vs. Douthitt, 140 Cal. App. 409: "The sufficiency of a Declaration of Homestead must be determined from the statements expressly made therein and cannot be affected by any secret intentions which may have been in the mind of the claimant."

The Declaration of Homestead in the instant case as we have said hereinabove, gave no answer whatsoever under "3 Description of premises." However, under item "6. No former Declaration of Homestead has been made by them, or by either of them, except as follows," and the following was inserted:

"The former declaration of homestead was abandoned on or about March 12, 1954."
(Italics added.)

Just what does this answer mean? A person can only have one homestead at a time. If the bankrupt has a homestead on other property, he cannot claim a homestead on the second property. [35] That is the purpose of the question and the necessity for its answer. What former Declaration of Homestead was abandoned? In what city or county? Where was

the Declaration recorded? Was it on the same property? The instrument itself does not state these facts.

Even if the former abandonment of homestead was inspected and a description ascertained, there would be no assurance that it referred to the same property. The said phrase, "The former Declaration of Homestead, etc.," does not state that it concerned the same property.

The answer is plain surplusage. It adds nothing. The answer (if a prior homestead had been abandoned—by sale or actual abandonment—then the necessary answer) would be "no" or "none."

The bankrupt, and we must admit with success, argued before the Referee that he intended to indicate that the Declaration on this very property was abandoned and the bankrupt contended that if a person was interested in so doing, he could search the records and find the said abandonment recorded and further could search the records and find the former Declaration and then secure the description therein contained; then supply it to the deficient document and thus perfect the same.

The use of such extrinsic evidence is not permissible. It is not permitted by the California decisions referred to hereinabove.

Thus we arrive at the conclusion that the Declaration does not comply with the Statute and is deficient.

It is respectfully submitted that the decision of the Referee, in the light of the decisions of this Court, the decisions of the United States Court of Appeals for the Ninth Circuit and the decisions of the California State Courts, should be reversed. [36]

CRAIG, WELLER &
LAUGHARN,

By /s/ HUBERT F. LAUGHARN,
Attorneys for A. S. Menick,
Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 20, 1957. [37]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES OF BANK-
RUPT IN REPLY TO TRUSTEE'S
AUTHORITIES FOR PETITION FOR
REVIEW

To the Honorable Thurmond Clarke, Judge of the United States District Court, Southern District of California.

The bankrupt herein, by and through his attorneys of record, Irving Sulmeyer and Eugene S. Ives, respectfully submits the following reply memorandum of points and authorities to the memorandum of points and authorities submitted by the Trustee herein, A. S. Menick.

Facts

The facts in this case are clearly and simply set forth in the memorandum of the Referee re objections to Trustee's report of exempt property. Those facts are adopted herein without repeating them at length.

The basic question in this case is whether the bankrupt substantially complied with the California homestead statute, Civil Code of California 1263, when he recorded that certain Declaration of Homestead on May 21st, 1954. We are here only concerned with the third requirement set forth in that code section which requirement [39] states that a description of the premises must be given. The homestead declaration (Exhibit 1) as indicated in the Referee's opinion fully met the other requirements of the statute. The only question remaining is whether the reference in that document to a previously recorded Abandonment of Homestead recorded on a specific date would supply the missing description.

I.

A Review of the Points and Authorities Filed by Trustee Fails to Indicate Any California Case Stating that a Precise Description of the Property is a Mandatory Requirement of the California Homestead Law.

A careful examination of the cases cited in the points and authorities filed by the Trustee herein reveals no case in which any California court has

said that the Homestead Statute will be strictly construed as to the description of the property sought to be homesteaded. To put it another way an examination of all the cases cited by the Trustee in his points and authorities reveal that the courts of California have said that the Homestead Statute will be strictly construed as regards the following:

1. Statement of the declarant as to his married status. (*Rich v. Ervin*, 86 Cal. App. (2d) 386, 194 Pac. (2d) 80; *Reid v. Engelhardt-Davidson Co.*, 126 Cal. 527, 58 Pac. 1063.)

2. Failure to give estimate as to actual cash value. (*Lynch v. Stotler*, 215 F. (2d) 776; *Ames v. Eldred*, 55 Cal. 136; *Ashley v. Olmstead*, 54 Cal. 616.)

3. Failure to indicate a homestead had or had not been previously selected. (*Crenshaw v. Smith*, 74 Cal. App. (2d) 255, 168 Pac. (2d) 752; *Schuler-Know Co. v. Smith*, 62 Cal. App. (2d) 86, 144 Pac. (2d) 47.)

II.

The Description of the Property Sought to Be Homesteaded in a Homestead Declaration Need Be No More Specific [40] Than in a Deed.

The memorandum of points and authorities of the Trustee reviews the cases covering the requirements of the California Homestead Statute which state that certain of the requirements in this statute are mandatory. However, the basic and elemental rule of the California law that the description of

the property in a Homestead Declaration need be no more particularly described than in a conveyance has been either disregarded or overlooked in said memorandum.

In the case of *Ornbaum v. His Creditors*, 61 Cal. 455, the court declared that a more particular description of land in a Declaration of Homestead is not required than is required in a deed of conveyance. That rule was again enunciated with approval in the case of *Jones v. Gunn*, 149 Cal. 687 at page 690.

Thus while there are requirements in the Homestead Act that must be strictly construed the courts of California and the Federal courts for the Ninth Circuit, which must follow the California rules, have allowed great liberality in determining the description of the premises sought to be homesteaded.

III.

The Purpose and Nature of the Homestead Legislation Requires That a Court Reviewing or Passing on the Legal Sufficiency of a Homestead Should Give Liberal Construction to Their Interpretation That Their Purposes May Be Carried Out to the Benefit of the Party or Parties Claiming the Homestead.

Homestead laws are predicated on public policy, their purpose being to promote a healthy social order and to prevent insolvent persons from becoming homeless.

Schmidt v. Denning,
117 Cal. App. 36;

Phelps v. Loop,
64 Cal. App. (2d) 332;

Rich v. Ervin,
86 Cal. App. (2d) 386.

The homestead laws are intended for the benefit of the [41] debtor rather than the creditor.

Simonon v. Burr,
121 Cal. 582.

The homestead laws are given a liberal construction in order to advance their beneficial objects and carry out the manifest purpose of the Legislature.

Greenlee v. Greenlee,
7 Cal. (2d) 579;

Johnson v. Brauner,
131 Cal. App. (2d) 713;

Oktanski v. Burn,
138 Cal. App. (2d) 419.

Contrary to the excerpts cited by the Trustee in his memorandum of points and authorities, page 2, line 27, through line 27, page 3, California courts have endeavored to give full effect, if at all possible to the benefits of the Homestead Declaration. Further the cases cited in the points and authorities of the Trustee are, as pointed out above, only dealing with the requirements other than the description of the premises in the Declaration of Homestead.

IV.

The Entire Document Here Under Consideration
Must Be Examined to Determine Its Legal
Sufficiency.

The document here considered contains a statement that Cecil M. Jackson, his wife and two children are residing on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, which they claim as a homestead, and further the value of this property sought to be homesteaded is set forth as being \$27,000. This document then contains a reference to "the" former declaration of homestead abandoned on or about March 12, 1954. An additional paragraph furnishes the information that the homestead property contains a six-room residence and garage.

In determining the legal sufficiency of this document we must examine it in its entirety to determine if it refers anywhere to another document which will furnish additional information to complete the legal description.

Ritchie v. Anchor Casualty Co., 135 Cal. App. (2d) 245, 251. [42]

Paragraph six does refer to an Abandonment of Homestead carried out on a specific date. It is submitted that if the Abandonment of Homestead of March 12, 1954, contains an adequate description the document here considered is legally sufficient.

V.

The Reference in the Document Here Under Consideration to the Abandonment of Homestead Recorded on a Specific Date Is a Reference Sufficiently Certain to Identify a Document Containing a Full Description of the Property, and Thus Cure Any Defect in the Document.

As indicated in section II above the description in a homestead declaration need not be more particular than in a conveyance.

In the case of Matter of the Estate of Caroline Ogburn, 105 Cal. 95, the description of the property sought to be homesteaded was as follows:

“Western part of lot No. 5 of said village as laid out by F. S. Freeman’s Division of said village, the same being 37 feet front on Main Street of said village, and extending back with parallel lines one hundred and ninety feet deep, it being a part of the southeast $\frac{1}{4}$ of section 21, in Township No. 10 of range 2 east.”

It was contended by the appellants that this description was void as there was nothing to show the location of lot 5. The court held that the Declaration of Homestead stated that the family resided upon the lot sought to be homesteaded, and this statement, together with such description which followed clearly enough designated the premises intended to be claimed as a homestead.

The above case is cited with approval in the case of Donnelly v. Tregaskis, 154 Cal. 261, at page 263, where the court stated: [43]

“In this discussion we do not mean to be understood as holding that to make a sufficient description a deed must refer to a map actually of record. We do mean, however, to declare the unquestioned rule that where a description is dependent for its sufficiency upon some instrument, such as a map, the map, properly identified, must be produced, or in some manner established, or the description must fail.”

The Trustee in his points and authorities has raised the question as to the determination whether the property sought to be homesteaded was in Los Angeles County or City or elsewhere, whether it was the same property and where the declaration was recorded. As indicated above this question is in a large part answered if the entire document is considered. It clearly shows that the property is in the City of Los Angeles and the County of Los Angeles, State of California, its value is given and it is described as a six-room residence and garage. In paragraph 6 the statement is made, “The former declaration of homestead was abandoned on or about March 12th, 1954.” Taking all the facts that are set forth on this document together it becomes manifest that they are all referring to the same piece of property and that the reference is with the certainty that has been referred to in the cases above cited. It is interesting to note in the case of *Oktan-ski v. Burn*, 138 Cal. App. (2d) 419, 291 Pac. (2d) 954 at 138 Cal. App. (2d) 421, the court pointed out that although the description of the property

created a manifest ambiguity so that two separate descriptions of two different properties existed that such a description was not defective. The court in that case determined the Declaration of Homestead was adequate. Certainly the same argument could have been made in that case as to the inability to determine where the property was located as in the present one. However, the rule set forth by the court in that case that homestead laws should be given their [44] most liberal construction in order to advance their beneficial objects and carry out the manifest purposes of the Legislature should be followed in the present one to support the Referee's decision.

Summary

The reference in the Declaration of Homestead here under consideration to a previously recorded Abandonment of Homestead recorded on a specific date is such an adequate reference as to supply the description, thus the Homestead Declaration recorded on May 21st, 1954, substantially complied with the requirements of the Homestead statute of the State of California.

It is respectfully submitted that a careful examination of the California cases and the decisions of the United States Court of Appeals from the Ninth Circuit will reveal no case that conflicts with the decision of the Referee in this matter and that this Honorable Court should affirm the decision of the Referee in its entirety.

Respectfully submitted,

IRVING SULMEYER and
EUGENE S. IVES,

By /s/ EUGENE S. IVES,
Attorneys for Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 21, 1957. [45]

United State District Court, Southern District of
California, Central Division
In Bankruptcy No. 73,351-TC

In the Matter of:

CECIL M. JACKSON,

Bankrupt.

ORDER GRANTING PETITION FOR RE-
VIEW, SETTING ASIDE REFEREE'S
ORDER OF JANUARY 8, 1957, AND DE-
TERMINING THAT BANKRUPT DOES
NOT HAVE VALID CLAIM OF HOME-
STEAD EXEMPTION

A. S. Menick, the trustee in the above-entitled bankruptcy estate, having filed his Petition for Review of a certain Order made by Referee David B. Head in the within bankruptcy proceeding on January 8, 1957, which set aside to the bankrupt certain real property as exempt, and the said Petition coming on for hearing before the Court and having been continued from time to time and having been heard on October 14, 1957, at the hour of 10:00 a.m. thereof, and

The trustee being represented by Craig, Weller & Laugharn by Hubert F. Laugharn, as his attorneys, and the bankrupt being represented by Irving Sulmeyer and Eugene S. Ives and Memorandums of Points and Authorities having been filed by the respective parties pursuant to Bankruptcy Rule 204 of this Court, and

The Court having determined that the Petition for Review should be granted and the Order of January 8, 1957, setting aside the said real property as exempt should be set aside and reversed,

Now, Therefore, lieu of the Findings of the Referee, [47] the Court makes and adopts the following Finding, to wit:

The Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954, did not comply with the provisions of Section 1263 of the Civil Code of the State of California in that it did not set forth a description of the real property claimed as exempt.

The Court concludes as a matter of law that the Declaration of Homestead was a nullity and the bankrupt is not entitled to a claim of exemption by virtue thereof.

Now, Therefore,

It Is Ordered that the Order of the Referee, dated January 18, 1957, be, and the same hereby is, set aside and reversed.

Dated: October 18, 1957.

/s/ THURMOND CLARKE,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed and entered Oct. 18, [48]
1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that Cecil M. Jackson, Bankrupt, in the above matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Petition for Review, Setting Aside Referee's Order of January 8, 1957, and Determining That Bankrupt Does Not Have Valid Claim of Homestead Exemption, entered in this action on October 18, 1957.

IRVING SULMEYER &
EUGENE S. IVES,

By /s/ EUGENE S. IVES,
Attorneys for Cecil M.
Jackson, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 15, 1957. [50]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages, numbered 1 to 54, inclusive, containing the original:

(Certified copy.) Schedule B-5, Page 15 of Bankrupt's Petition.

Trustee's Report of Exempt Property.

Bankrupt's Objections to Trustee's Determination of Exempt Property.

Points and Authorities in Support of Bankrupt's Objections to Trustee's Determination of Exempt Property Memorandum by Referee re Objections to Trustee's Report of Exempt Property.

Findings of Fact, Conclusions of Law and Order re Homestead Exemption.

Petition for Review.

Memorandum of Points and Authorities in Support of Trustee's Petition for Review.

Points and Authorities of Bankrupt in Reply to Trustee's Authorities for Petition for Review.

Order Granting Petition for Review, setting aside Referee's Order of January 8, 1957, and

Determining That Bankrupt Does Not Have Valid Claim of Homestead Exemption.

Notice of Appeal.

Request for Preparation of Clerk's Transcript on Appeal.

B. Bankrupt's Exhibits 1, 2 and 3.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated: December 9, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15826. United States Court of Appeals for the Ninth Circuit. Cecil M. Jackson, Bankrupt, Appellant, vs. A. S. Menick, Trustee in Bankruptcy of Cecil M. Jackson, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 11, 1957.

Docketed December 23, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15826

In the Matter of:

CECIL M. JACKSON,

Bankrupt and Appellant,

vs.

A. S. MENICK,

Appellee.

STATEMENT OF POINTS
ON APPEAL

The points upon which Appellant will rely on appeal are:

(1) That the Court erred in granting the petition for review setting aside the Referee in Bankruptcy's Order of January 8th, 1957, and determining that the bankrupt did not have a valid claim of homestead exemption.

(2) That the Court erred in finding that the declaration of homestead recorded by the bankrupt and his wife on May 21st, 1954, did not comply with the provisions of Section 1263 of the Civil Code of the State of California.

(3) That the Court erred in finding that the declaration of homestead recorded by the bankrupt and his wife on May 21st, 1954, did not set forth

an adequate description of the real property claimed as exemption.

(4) That the Court erred in finding that the declaration of homestead recorded by the bankrupt and his wife on May 21st, 1954, did not contain a sufficient reference to a previously recorded document containing a full and complete description of the property homesteaded.

(5) That the Court erred in concluding as a matter of law that the declaration of homestead was a nullity and the bankrupt was not entitled to a claim of exemption by reason of the homestead recorded on May 21st, 1954.

(6) That the Court erred in concluding as a matter of law that the declaration of homestead recorded by the bankrupt and his wife on May 21st, 1954, did not contain within its four corners sufficient data including a reference to a previous recorded document to comply with the provisions of Section 1263 of the Civil Code of the State of California.

Respectfully submitted,

IRVING SULMEYER &
EUGENE S. IVES,

By /s/ MARTIN J. KIRNAN,
Attorneys for the Bankrupt
and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 24, 1957.

No. 15826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECIL M. JACKSON, BANKRUPT,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLANT'S OPENING BRIEF.

IRVING SULMEYER,
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I.

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IN THE

United States Court of Appeals

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CECIL M. JACKSON, BANKRUPT,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The Bankruptcy Act, Section 24A (11 U. S. C. §47). The United States Court of Appeals in vacation, in chambers, and during their respective terms does now or as they may hereafter be held, are hereby invested with Appellate jurisdiction from the several courts of Bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse both in matters of law and in matters of fact: Provided however, that the jurisdiction upon Appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: and, provided further, that when any order, decree or judgment involves less than \$500.00 an appeal therefrom

may be taken only upon the allowance from the appellate court.

In the Matter of Bush Terminal Co. (C. C. A. 2, 1939), 40 A. B. R. (N. S.) 581, 105 F. 2d 156;
Robertson v. Berger (C. C. A. 2, 1939), 39 A. B. R. (N. S.) 1062, 102 F. 2d 530;
Coursey v. International Harvester Co. (C. C. A. 10, 1940), 42 A. B. R. (N. S.) 291, 109 F. 2d 774.

The order of the bankruptcy court as to exemptions is conclusive, subject, of course, to review on appeal and may not be collaterally attacked.

Friedsam v. Rose, State Court Decision (Tex. 7 Appeal), 6 A. B. R. (N. S.) 864, 271 S. W. 417.

Statement of the Case.

This is an appeal by a bankrupt from Order Granting Petition for Review, Setting Aside Referee's Order and Determining that Bankrupt Does Not Have a Valid Claim of Homestead Exemption.

In his scheduled file with his bankruptcy petition, the bankrupt claimed exemption of a homestead on a certain parcel of real property. This exemption was claimed pursuant to a declaration of homestead filed by the bankrupt and his wife on May 21, 1954, in the County Recorder's Office, City of Los Angeles, County of Los Angeles, State of California. The trustee in bankruptcy, A. S. Menick, respondent in the present action, refused to set aside the property as exempt, contending that the declaration of homestead recorded on May 21, 1954 [Ex. I] was void and of no effect for the reason that no description of the property claimed as a homestead was found in the declaration. Objections were filed to this report of the trustee's

determination of property by the bankrupt. The Referee, David B. Head, after hearing, sustained the objections of the bankrupt to the trustee's determination of exempt property and entered an order on January 8, 1957, allowing the homestead exemption on the bankrupt's real property. The trustee, A. S. Menick, appellee herein, filed a petition for review of the order of the Referee dated January 8, 1957, and to set aside said order. The Court, Thurmond Clarke, on October 18, 1957, entered an order that the order of the Referee dated January 8, 1957, be set aside and reversed. This appeal is taken from said order.

The facts in this case are not disputed. The bankrupt was living with his family on the property claimed as exempt on May 21, 1954, the date of the recording of a declaration of homestead by the bankrupt and his wife in the County Recorder's Office, City of Los Angeles, County of Los Angeles, State of California. This declaration of Homestead was completely filled out in all respects, except Paragraph 3 of said document did not contain the description of the property sought to be homesteaded.

The Homestead Declaration [Ex. 1] states as follows:

“(3) They are now residing on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, and more particularly as follows: (No description of the premises is set out)

* * * * *

“(6) No former declaration of homestead has been made by them, or either of them, except as follows:

“The former declaration of homestead was abandoned on or about March 12th, 1954.

“(7) The character of said property so sought to be homesteaded and the improvement or improvements which have been affixed thereto, are as follows: Six-room residence and garage.”

On March 12, 1954, the bankrupt and his wife filed an abandonment of homestead [Ex. 2] which described the property upon which the homestead was abandoned as follows:

“Lot 2 in block 8 of Brentwood Park in the City of Los Angeles, County of Los Angeles, State of California as per map recorded in Book 9, page 10 of Maps, in the Office of the County Recorder of said County.

“Also that portion of Avondale Avenue and Hanover Street, abandoned by Ordinance No. 41346 (New Series of said City), adjoining said lot 2 on the northwest, bounded on the north by the southerly line of said Hanover Street, as now established 75 feet wide, and on the west by the easterly line of said Avondale Avenue, as now established 75 feet wide.

“Commonly known as 306 Avondale Avenue, Los Angeles, California.”

The first Declaration of Homestead [Ex. 3] which was abandoned gave the same description excepting the street address.

No evidence was introduced at the hearing before Referee Head or at any other step in the proceedings nor has it been claimed at any time that the bankrupt owned any other real property in the City of Los Angeles, County of Los Angeles, State of California, on which he might have attempted to claim a Homestead by recording the Declaration of Homestead on May

21, 1954, other than the property described in Exhibit 2 and Exhibit 3; that this is the only piece of real property he owned at the time he made the Declaration of Homestead or any other time.

The sole issue in this Appeal is whether the Declaration of Homestead was sufficient, complete and adequate to meet the requirements of the statute, California Civil Code, Section 1263, as interpreted by the Courts of the State of California.

Specification of Error.

I.

That the Court erred in granting the Petition for Review Setting Aside the Referee's in Bankruptcy Order of January 8, 1957, and determining that the Bankrupt did not have a valid claim of homestead exemption.

II.

That the Court erred in finding that the Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954 did not comply with provisions of Section 1263 of the Civil Code of the State of California.

III.

That the Court erred in finding that the Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954, did not set forth an adequate description of the real property claimed as exemption.

IV.

That the Court erred in finding that the Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954, did not contain a sufficient reference to a previously recorded document containing a full and complete description of the property homesteaded.

V.

That the Court erred in concluding as a matter of law that the Declaration of Homestead was a nullity and the bankrupt was not entitled to a claim of exemption by reason of the homestead recorded on May 21, 1954.

VI.

That the Court erred in concluding as a matter of law that the Declaration of Homestead recorded by the bankrupt and his wife on May 21, 1954, did not contain within its four corners sufficient data including a reference to a previously recorded document to comply with the provisions of Section 1263 of the Civil Code of the State of California.

Summary.

The bankrupt, by referring in the Declaration of Homestead, recorded on May 21, 1954, to a specific document recorded on a specific day, made an adequate reference to supply the description absent from the Declaration of Homestead recorded on said date. That the evidence from Exhibits 1, 2 and 3, is uncontradicted and shows that at all times in question the bankrupt and his family resided on the property sought to be homesteaded.

ARGUMENT.

I.

The Court Erred in Entering an Order on October 18, 1957, Setting Aside the Order of the Referee Declaring the Bankrupt's Right to Have the Homestead Exemption as to the Real Property Allowed and Concluding as a Matter of Law That the Declaration of Homestead Recorded May 21, 1954, Did Not Contain an Adequate Description or a Reference to a Previously Recorded Document Adequate to Supply the Legal Description.

The description of the property sought to be homesteaded need be no more specific in a Declaration of Homestead than in a conveyance.

Ornbaum v. Creditors, 61 Cal. 455;

Jones v. Gunn, 149 Cal. 687.

In the present case, the reference to another document, the previously recorded abandonment of Homestead [Ex. 2] would supply the missing description. The question whether reference to another document is adequate to supply an otherwise insufficient description has been considered many times by California Courts.

In the case of the *Matter of the Estate of Caroline Ogburn*, 105 Cal. 95, the description of the property sought to be homesteaded was as follows:

“Western part of Lot No. 5 of said village as laid out by F. S. Freeman's Division of said village, the same being 37 feet front on Main Street of said village, and extending back with parallel lines 190 feet deep, it being a part of the southwest one-quarter of section 21, Township 10 of Range 2 East.”

It was contended by the appellant in the *Ogburn* case that this description was void as there was nothing to show the location of Lot 5. The Court held that the Declaration of Homestead stated that *The family resided upon the lot sought to be homesteaded* (emphasis added) and this statement, together with such description which followed clearly enough designated the premises intended to be claimed as a homestead.

It is to be noted in the case at bar that Cecil M. Jackson, the bankrupt, *resided on the premises* at the time he requested the exemption of the property under the Declaration of Homestead recorded May 21, 1954 as well as at the time Exhibits 2 and 3 were recorded.

The *Ogburn* case is cited with approval in the case of *Donnelly v. Tregaskis*, 154 Cal. 261. The Court said therein at page 263

“ . . . A description of the premises necessarily means such description as will serve to identify the property. To uphold homesteads, which are favored by the law, great liberality in this respect will be allowed, but the rule nevertheless obtains in full force, that the description must be sufficient so that the property may be identified in some legitimate manner. . . .”

Again on page 264,

“ . . . We do not mean, however, to declare the unquestioned rule that where a description is dependent for its sufficiency upon some other instrument, such as a map, the map, properly identified, must be produced, or in some manner established, or the description must fail. . . .”

A reference to a document previously recorded containing the description of property is adequate to furnish the legal description if there is such a document on record.

Marcone v. Dowell, 178 Cal. 396.

California Civil Code, Section 1263, requires a description of the property sought to be homesteaded but the cases which interpret this code section and the adequacy of the description do not make a specific legal description mandatory. If the document referred to can be located with reasonable certainty and if said document referred to does contain a legal description, then the document containing the reference does have an adequate description to fulfill the requirements of a Deed and therefore fulfills the requirements of a Homestead Declaration.

II.

The Court Erred in Finding as a Matter of Law That the Reference in the Homestead Declaration Recorded May 21, 1954, Was Not a Specific Reference as Required in Conveyances in the State of California.

The adequacy of the description of the property sought to be homesteaded was considered in the case of *Oktanski v. Burn*, 138 Cal. App. 2d 419. In that case, the description of the property in the Declaration of Homestead referred to two different properties. The Court determined the Declaration of Homestead was adequate. The same argument could have been made in that case as to the inability to determine where the property to be homesteaded was located as has been made by the trustee in the present case. There, the Court had no problem in finding which property was to be homesteaded. It is submitted, the situation there is directly synonymous with

the present action. The description of the property sought to be homesteaded *can* be determined from the previously recorded abandonment of homestead. That Courts can examine the entire record and the evidence before them to determine the correct result to be reached in their decisions can be applied to the present matter under consideration. It is interesting to note that the Order signed by the Court setting aside the Order of the Referee allowing the exemption of Homestead property refers to an Order of the Referee dated January 18, 1957. In fact and in truth, there is no Order of the Referee dated January 18, 1957, but said Order was dated January 8, 1957. Appellant does not argue this technicality. It is submitted that the correct Order, although improperly designated, can be found. So too, in the present action, the correct property sought to be homesteaded can easily be determined. The recording of a homestead is for the purpose of giving notice of the declaring of a claim. A person searching the records of the County Recorder's Office would find the declaration of May 21, 1954. He would not find a description of the property in that document. He would find a reference to an Abandonment of Homestead on or about March 12, 1954. Then, in the proper index, he would find the Abandonment. The abandonment would give a complete description of the property and then if he went out to examine the property he would have found the bankrupt and his family living on the property and there was a six room house and a garage on the premises, as described in Exhibit 1.

The argument might be made that the reference in this Homestead could refer to another piece of property. Such an argument was made in reference to a conveyance in the case of *Joyce v. Tomasini*, 168 Cal. 234. In that case,

a contractor executed a lease for certain land, only describing the land by giving the names of individuals who lived on each side of him. The Court allowed extrinsic evidence to be admitted to establish the exact description of the land. In response to the argument that there might be another tract of land of the same acreage, either in the County where the land was alleged to be located or elsewhere, that was bounded by other land belonging to the same persons as named, the Court held that if such a coincidence existed it was incumbent upon the defendant to plead and prove it. The Court held further that in the absence of such proof, it will be presumed, upon the other facts shown, that these boundaries do identify the tract. In the present action, no evidence has been introduced or has it been claimed at any time that the bankrupt during the period in question owned any property in any other county or anywhere else in Los Angeles City or County that could have been subject or was subject to a Homestead Declaration.

In determining the legal sufficiency of the Declaration of Homestead under consideration, it must be examined in its entirety, to determine if it refers anywhere to another document which will furnish additional information to complete the legal description. That the four corners of a document must be examined to determine its legal adequacy was determined in the case of *Ritchie v. Anchor Casualty Company*, 135 Cal. App. 2d 245, 251.

In examining the entire document, Paragraph (6) of the Declaration refers to:

“The former declaration of Homestead was abandoned on or about March 12, 1954.” (Italics added.)

This reference to *the* former Declaration of Homestead denotes, it is submitted, a clear reference to a specific abandonment of a Homestead on the same property. The word THE as defined in Black's Law Dictionary, Third Edition, page 1724 is an article which particularizes the subject spoken of.

III.

The Court Erred in Finding as a Matter of Law That the Homestead Declaration Recorded May 21, 1954, Was Void and of No Effect.

The Courts decision failed to give a liberal construction to California Civil Code, Section 1263, which defeats the purpose of the Homestead Legislation which was enacted for the benefit of the parties claiming the Homestead.

Homestead laws are predicated on public policy. Their purpose being to promote a healthy social order and prevent insolvent persons from becoming homeless.

Schmidt v. Denning, 117 Cal. App. 36;

Phelps v. Loop, 64 Cal. App. 2d 332;

Rich v. Ervin, 86 Cal. App. 2d 386.

The Homestead laws are given a liberal construction in order to advance the beneficial objects and to carry out the manifest purpose of the legislature.

Greenlee v. Greenlee, 7 Cal. 2d 579;

Johnson v. Brauner, 131 Cal. App. 2d 713;

Oktanski v. Burn, 138 Cal. App. 2d 419.

That Homestead laws should be given a liberal interpretation is not a rule of law resting on maudlin sentimentalism. The purpose behind the rule has been clearly

set forth by the California Courts in the above cited cases. To apply a strict interpretation of this statute would defeat the purpose for which the statute was enacted.

The Court in the case of *Oktanski v. Burn*, 138 Cal. App. 2d 419, at page 421 pointed out that if possible they were going to uphold the Homestead Declaration which would otherwise be defective, in the following language:

“It is conceded in appellant’s brief that ‘The street address alone would be sufficient as a description for the purpose of Homestead,’ but it is contended that here ‘we have two complete descriptions of two entirely different properties’; for which reason the Declaration is fatally defective. To adopt appellants’ reasoning, however, would tend to defeat rather than to ‘advance their beneficial objects and to carry out the manifest purpose of the legislature,’ under the rule expressed in *Greenlee v. Greenlee*, 7 Cal. 2d 579, 583.”

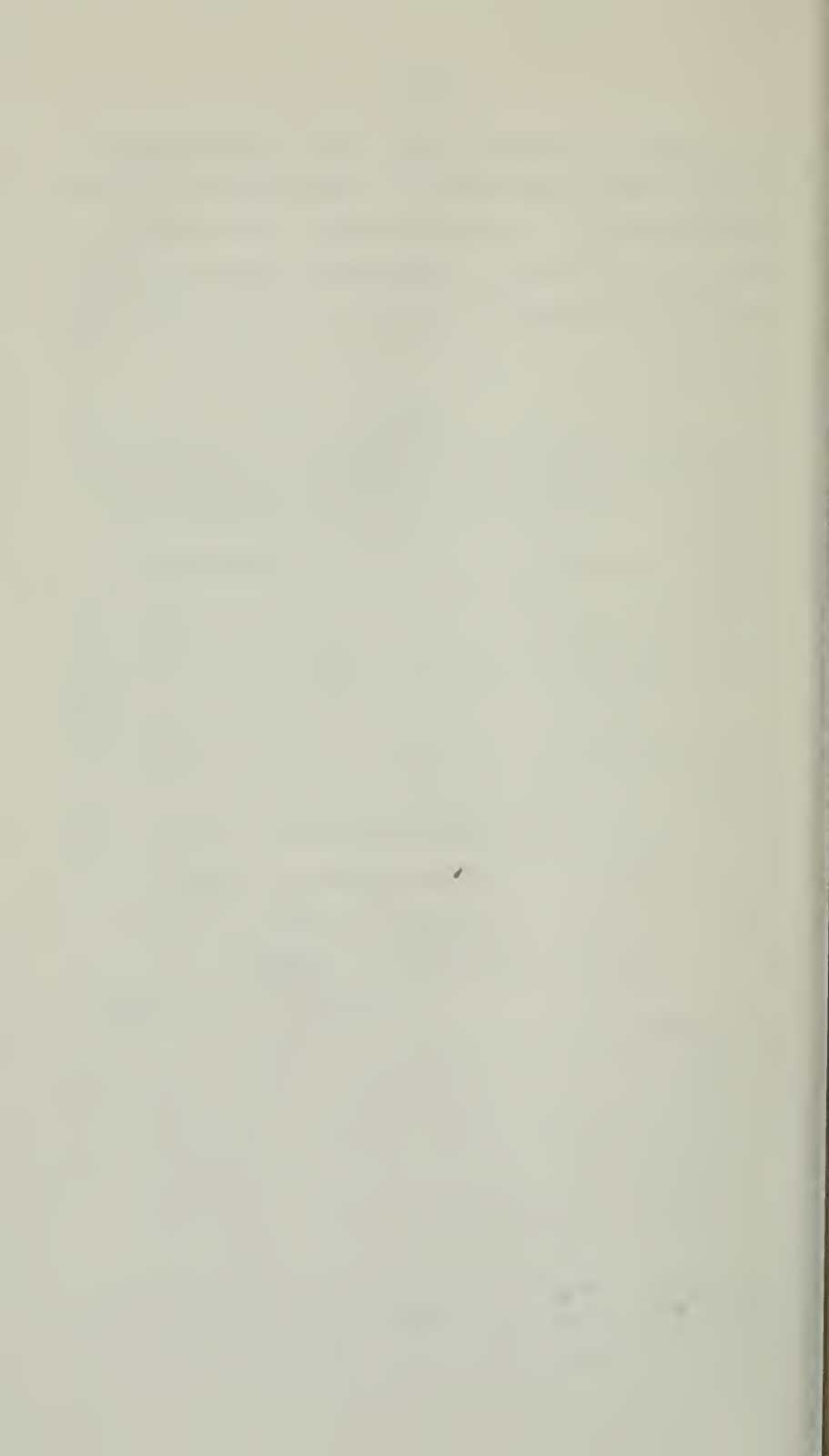
Respectfully submitted,

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No. 15826.

IN THE

United States Court of Appeals

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CECIL M. JACKSON, Bankrupt,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLANT'S CLOSING BRIEF.

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vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLANT'S CLOSING BRIEF.

Statement of the Case.

Cecil M. Jackson, bankrupt, has taken an appeal from an Order granting a Petition for Review setting aside the Referee's Order and determining that bankrupt does not have a valid claim of Homestead exemption. The question on Appeal is whether a Declaration of Homestead which was executed and recorded by the bankrupt and his wife contains an adequate description by reference to a previously recorded document.

ARGUMENT.

I.

Review of Cases Cited by the Appellee.

In examining the rather rambling review of the cases set forth in appellee's brief, it should be noted there is no case cited in said brief which requires that the description in a Homestead be more precise than in a Deed. Many facets of the law of Homestead are reviewed in the Appellee's Brief covering the other requirements as laid down in Section 1263 of the Civil Code of California, none of which are pertinent to the question involved here, to wit, whether the reference in the Declaration of Homestead recorded by Mr. and Mrs. Jackson to a previously recorded document was adequate to supply the missing description.

The Appellant herein does not contend that any formal requirement as set forth in California Civil Code, Section 1263, be eliminated. The Appellant does contend that the legal description of the Homestead need be no more specific than in a Deed.

Ornbaum v. Creditors, 61 Cal. 455.

That the description necessary in a Deed can be supplied by reference to another document previously recorded is elementary law in California.

Marcone v. Dowell, 178 Cal. 396.

Appellee cites the case of *Lynch, Trustee v. Stotler*, 215 F. 2d 776, for the proposition that the requirements of the California Homestead statute must be performed before a Homestead can validly exist. The Appellant has no argument with this rule of law. However, the de-

scription in the Homestead Declaration can be ascertained not only from a full legal description being set forth on the Homestead Declaration but by reference to a previously recorded document.

As was pointed out in the case of *Oktanski v. Burn*, 138 Cal. 2d 419:

“It is true that a valid homestead description should contain a reasonably correct description, but it is not true that absolute perfection is required.”

II.

The Reference to the Previously Recorded Document Was a Sufficient Reference to Supply the Missing Description.

The Appellee now argues on one hand that the former Declaration of Homestead could have referred to property anywhere, including San Diego County, and on the other hand argues that a Declaration of Homestead is a means of furnishing the creditor body with certain information in recorded form open to the world. If that is true, then anyone searching the Los Angeles Recorder's Office, after finding no description in the Declaration of Homestead under question, but a reference to “the former Declaration of Homestead was abandoned on or about March 12, 1954,” certainly should be bound to check the records of the Los Angeles County Recorder's Office further rather than idly speculate on whether the property subject to the former Homestead was in Los Angeles County or in some other county, such as San Diego County. A further examination of the records of Los Angeles County for the date referred to, March 12, 1954, would indicate the great similarities between the document's reference to the property. Both documents referred to property in the

City of Los Angeles, County of Los Angeles, State of California. Both show the same parties signing the document were living on the property and that the property sought to be homesteaded consisted of a six-room residence and garage. Such similarity should certainly be notice to any creditor. Upon checking the property the creditor would find that the same parties mentioned in both documents were occupying it.

The argument made by the Appellee is much the same argument which was overruled in the case of *Joyce v. Thomasini*. The Court there ruled that it would not be presumed for the purpose of nullifying a contract to sell land that there was another tract of land of the specified acreage either in such county or elsewhere that is bound by other lands belonging to the same persons as named. The court stated that if such coincidence exists it was incumbent on the defendant to plead and prove it.

No evidence was introduced at the hearing in the bankruptcy court before the Referee, nor has it been contended at any point in the proceeding that the bankrupt ever had a Homestead on any other property other than that thought to be Homestead or owned at any time any other property he could or did Homestead.

Appellant's Opening Brief, page 8, referred to the case of the *Matter of the Estate of Caroline Ogburn*, 105 Cal. 95, where the Court, in determining whether a description was sufficient, decided that because the Declaration contained a statement that the family resided upon the lot sought to be Homesteaded, that this statement along with such description as was present in the Declaration was adequate to meet the requirements of the Homestead Statute.

The Appellee takes the position that the bankrupt in this case has merely recorded a document saying in effect, "I want a homestead." However, in blandly summarizing the efforts of the bankrupt in this respect, Appellant respectfully submits the Appellee has disregarded what has seemed to be the test laid down by the California courts in interpreting the California Homestead Statute, Civil Code, Section 1263. It would appear that the decisions reached in such cases as the *Matter of the Estate of Caroline Ogburn*, 105 Cal. 95; *Donnelly v. Tregakis*, 154 Cal. 261; *Oktanski v. Burn*, 138 Cal. App. 2d 419, or the case of a Deed, *Marcone v. Dowell*, 178 Cal. 396, the Court has asked the question, "can this description be made certain?" It appears in these cases that if there is some external evidence referred to in the document itself which will make the description certain, then the Courts will uphold the validity of the document. In the present instance, in addition to the fact that the bankrupt is living on the property (Notice to his Creditors) the reference to the previously recorded Abandonment of Homestead certainly should complete the need for certainty.

III.

Did Any Creditors Rely on the Lack of a Classical Legal Description in the Homestead Declaration?

The Appellee admits in his reply brief that many California cases refer to the Homestead Statutes as "a remedial measure to be liberally construed."

Schuyler v. Broughton, 76 Cal. 524.

To carry out this manifest purpose of the legislature would not seem, in any way to be detrimental to the creditors unless they proved that they had truly relied on the Homestead Declaration in question being void. Thus,

it would not seem to be a question of whether we are considering the code section as interpreted by the California courts to be a harsh or unfair interpretation. We must only consider whether, under the circumstances as outlined in these briefs and giving liberal construction to said code section, there has been such a compliance with it as interpreted by all the California cases on the subject as to create a valid homestead. It is respectfully submitted that even without applying a liberal interpretation of the cases, this court might well find that there has been full compliance with the Homestead statute. In light of such a decision as the case of *Oktanski v. Burn*, 138 Cal. App. 2d 419, an application of the liberal construction of this statute, Civil Code, Section 1263, would seem to eliminate any existing doubt as to the sufficiency of the Homestead Declaration in question.

Applying such liberal construction to the present facts, it would seem to result in notice to the bankrupt's creditors who might have searched the Los Angeles records and found the bankrupt's claim to a Homestead which referred to the previously recorded abandonment. Certainly, if these creditors had notice of such a claim by the bankrupt, then, the liberal interpretation is a logical one and fair to both debtor and creditor. The statute, under such circumstances, has carried out the manifest purpose of the legislature.

Respectfully submitted,

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APPELLEE'S BRIEF.

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No. 15826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECIL M. JACKSON, Bankrupt,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of Cecil M. Jackson,

Appellee.

APPELLEE'S BRIEF.

Statement of Case.

The question here on appeal pertains to the sufficiency of a Declaration of Homestead which was executed and recorded by the bankrupt and his wife and whether or not the same meets the requirements of Section 1263 of the California Civil Code, with particular reference to subdivision (3) thereof—one of the formal requirements which pertains to description of the real property claimed as exempt.

Apparently through oversight, no description of any kind was inserted in the declaration.

The District Judge in reversing the Referee, found the said Declaration of Homestead did not comply with the provisions of Section 1263 in that it did not set forth a

description of the real property claimed as exempt and, further that the Declaration of Homestead was a nullity and the bankrupt was not entitled to a claim of exemption by virtue thereof.

As shown by the records herein, there had been a former Declaration of Homestead recorded which was abandoned. Thereafter the imperfect Declaration of Homestead was recorded.

Contentions of Appellant.

The appellant argues that the United States District Judge should have, and this Court should, apply such a rule of liberality as would determine that the formal requirement for the setting forth of the description of the premises claimed as exempt (Sec. 1263(3)) be deemed complied with because the said Declaration of Homestead under subdivision (6) thereof (no former Declaration of Homestead has been made by them, or either of them except as follows): The following was inserted, "The former Declaration of Homestead was abandoned on or about March 12, 1954." The appellant urged this on the review before the District Judge without success.

Formal Requirements.

As aforesaid, one of the formal requirements of said Section 1263(6) is the statement: "that no former declaration has been made, or, if made, that it has been abandoned—."

Under California law it is only possible to have one claim of Homestead exemption at any given time. The statement that: "The former Declaration of Homestead was abandoned on or about March 12, 1954," does not indicate that the former Declaration of Homestead was

on the same property. From the face of the present Declaration of Homestead, it well could be that the abandonment referred to was on a former home of the appellant, for example in the County of San Diego. The said statement does not indicate in which county of the State of California the instrument of abandonment of homestead might be found. Likewise the statement does not indicate the abandonment was recorded at any particular place. Therefore, the argument of appellant that sufficient clues were provided in the "descriptionless" declaration as would direct a person on to a search (1) which would eventually lead to the discovery of an instrument of abandonment, (2) which instrument would contain a legal description, (3) which upon further investigation could be established as pertaining to the same premises as purportedly covered by the questioned Declaration of Homestead.

Such collateral research and investigation does not come under the heading of the most extended liberal construction as contended for by the appellant here.

In final analysis, we believe the observation of Circuit Judge Richard H. Chambers as expressed in the recent case of *Lynch, Trustee v. Stotler*, 215 F. 2d 776 at 778, is as apt here as it was in that case:

"Although homestead exemptions are a creature of statute and not of common law, we are bound to and we do accept the idea that the statute should not be too strictly construed. But where the homestead requires as a condition of its existence the performing of certain acts and some of them have not been performed, we find no California case that would justify us in reading statutory requirements out of the statute. As we have construed the declaration, the bankrupts did little more than say in writing, 'We want a homestead.'

“We think we are compelled to deny the homestead on the basis of the underlying reasoning of the following California cases: *Rich v. Ervin*, 86 Cal. App. 2d 386, 194 P. 2d 809; *Crenshaw v. Smith*, 74 Cal. App. 2d 255, 168 P. 2d 752; *Schuler-Knox Co. v. Smith*, 62 Cal. App. 2d 86, 144 P. 2d 47; *Reid v. Englehart-Davidson Co.*, 126 Cal. 527, 58 P. 1063; *Ames v. Eldred*, 55 Cal. 136; *Ashley v. Olmstead*, 54 Cal. 616.”

Determinations of This Court With Respect to Homestead Exemptions.

Counsel for the appellee have been before this Court in the recent cases involving homesteads and exemptions in bankruptcy proceedings. We have likewise appeared in the past forty years in quite a number of matters before the District Judges on the said exemption problem arising in bankruptcy estates upon which no appeals to this Court followed.

The most recent decision by this Court in which we appeared was the *Lynch, Trustee v. Stotler* case above referred to, in which case this Court reversed the United States District Judge and held in effect that the “formal requirements” of Section 1263 of the Civil Code meant “formal” in every sense of the word and the failure to fill in and provide the estimate of actual cash value, made the Declaration of Homestead fatally defective.

We were also before this Court in the recent case of *England v. Sanderson*, 236 F. 2d 641, and were permitted by this Court to file a brief *amicus curiae* and also attend and argue the matter in San Francisco at the time of the presentation of the appeal.

We also represented the trustee in bankruptcy in the case of *Sampsell v. Straub*, 189 F. 2d 379, which decision

held that the Declaration of Homestead filed after bankruptcy was valid. A Petition for rehearing was granted and we appeared at the reargument and resubmission of the said case, to-wit: *Sampsell v. Straub*, 194 F. 2d 228, which determined that the Declaration of Homestead was not effective because not recorded prior to bankruptcy.

Because of our continued interest in the matter of exemptions in bankruptcy estates, we would like to place before this Court all of the cases which we have accumulated on this subject, both for and against the proposition here argued by us. In effect, none of the cases are contrary to our argument here and the fact is that these cases which might be termed to be adverse to our position, contain declarations with respect to certain matters which are easily distinguished from the glaring omission we have here.

Attention is called to the six cases referred to hereinabove in the *Lynch, Trustee v. Stotler* case which were relied upon by this Court in that case. We will cite hereinafter quite a number of additional cases which could have been placed in this category.

Most of the authorities to which we will refer to are contained in the recent case of *Johnson v. Brauner*, 131 Cal. App. 2d 713. In this case the District Court of Appeal on March 22, 1955, affirmed the judgment of the Superior Court (Opinion by Judge Ashburn). Frankly, we have no argument with that opinion or in fact, its result, except, possibly, the citing therein of the *Stotler* case and reference in it to the decision of United States District Judge in 114 Fed. Supp. 301 in support of the so-called liberality rule without noting the fact that almost six months to the day before the *Johnson* case, this Court had reversed the said *Stotler* case (215 F. 2d 776).

Cases (in Addition to Those Set Forth in the Lynch, Trustee v. Stotler Case) Which Hold That the Declaration of Homestead as Being Deficient or Imperfect and That the Formal Requirements of the Statute Not Having Been Met, the Declaration of Homestead Was Rendered Ineffectual.

Jones v. Gunn, 149 Cal. 687. Declaration contained description of property and also all other land owned by the husband. Declaration determined by the California Supreme Court to be imperfect.

Beck v. Soward, 76 Cal. 527. Imperfect execution and acknowledgment of Declaration of Homestead renders declaration void.

Boreham v. Byrne, 83 Cal. 23. Declaration imperfect which did not state that the residence of the declarant and family was on the premises and cannot be made sufficient by actual proof of such residency.

Cunha v. Hughes, 122 Cal. 111. Declaration of Homestead by wife which does not contain statement that husband has not made declaration and she made same for joint benefit is ineffectual.

Tappendorff v. Moranda, 134 Cal. 419. "The right to a homestead, and to enjoy the privileges and immunities incident thereto—exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a homestead upon a tract of land is mandatory, and cannot be dispensed with—actual cash value must be given and not 'actual cost value.'"

Morand v. Hoyerdahl, 38 Cal. App. 77. The statute at that time required declaration to show declarant, if married and head of a family, etc., and where statement

showed declarant head of family, but did not state he was married, declaration was ineffectual.

Olds v. Thorington, 47 Cal. App. 355. Declaration of Homestead is not effectual where it does not contain one of the formal requirements, to wit: the statement that the person making it is residing on the premises.

Booth v. Galt, 58 Cal. 254. Declaration invalid where married woman did not state that her husband had not made declaration and that she made same for joint benefit.

Hansen v. Union Savings Bank, 148 Cal. 157. Same as above case.

Santa Barbara Lumber Company v. Ross, 183 Cal. 657. Declaration ineffectual unless formal requirements of statute are met.

The above cases are some of the principal cases which point out the necessity for the compliance with the provisions of the statute with respect to the form and substance of the Declaration of Homestead.

Cases Cited by Appellant.

The following cases have been cited by the appellant in support of his contention that the Order of the United States District Judge should be reversed. We do not believe a single one of these cases supports the contentions of appellant.

The following group of cases are cited to demonstrate the proposition as asserted by the appellant:

“that homestead law is predicated on public policy; their purpose being to promote a healthy social order and prevent insolvent persons from becoming homeless; that the homestead laws are to be given a liberal construction in order to advance the beneficial objects

and to carry out the manifest purpose of the legislature; that the homestead laws should be given a liberal interpretation is not a rule of law resting on 'maudlin sentimentalism,' and to apply a strict interpretation of this statute would defeat the purpose for which the statute was enacted."

Schmidt v. Denning, 117 Cal. App. 36. The homestead in this case being permitted upon a building consisting of flats, in one of which the homestead declarant was residing.

Phelps v. Loop, 64 Cal. App. 2d 332. In this case the Declaration of Homestead covered a building occupied by the family, part of which was used to supplement the family income. The Declaration of Homestead was valid.

Rich v. Ervin, 86 Cal. App. 2d 386. A Declaration of Homestead must contain certain information and the statement of an untruth relative to an essential requirement vitiates the document. The mode in which a homestead is to be created as well as the legal incidents which attached to its existence are purely statutory (13 Cal. Jur. 427). The provisions relating to the acquisition of a homestead are construed to be mandatory.

Greenlee v. Greenlee, 7 Cal. 2d 579. Action instituted by wife against husband for separate maintenance upon ground of desertion. Judgment in favor of wife. In addition to \$50 a month gave possession to real property to wife. Contention that no valid Declaration of Homestead ever declared thereon by wife. Court found that while residing on premises, wife recorded Declaration of Homestead stating property was home of herself and husband. Declaration recorded after husband left wife. Court held sufficient compliance and homestead declared valid.

Johnson v. Brauner, 131 Cal. App. 2d 713. We have heretofore commented on this case and reported numerous authorities therefrom. However, the case itself because of the factual basis bears no support to the argument of the appellant herein.

We believe the case fairly presents both sides of the problem, although it may be there is an indicated leaning in favor of liberality and alleviation from strict compliance with the statute. On the other hand, the *Johnson* case possibly does keep within the permissible bounds of liberality of construction in that it merely determined that the declaration by the wife on property owned by her and her husband as joint tenants substantially complies with the statutory provisions, although it did not contain the statement in the words of the statute, *i. e.*, "that she therefore makes the declaration for their joint benefit." The Court pointed out it contained all of the requisite matters (including the legal description of the premises) other than such assertion and including the statement that no former Declaration of Homestead had been made by her or her husband.

We respectfully urge that the reasoning in this decision cannot be used to supply the missing legal description in the Declaration of Homestead in the instant case.

Further Cases Cited by Appellant.

Oktanski v. Burn, 138 Cal. App. 2d 419. The Court stated at page 421:

"In the instant case Mr. and Mrs. Oktanski complied with the statutory requirements, and the declaration of homestead correctly described the property as '740-742 Junipero Avenue' in Long Beach. The only inexactitude therein lies in the fact that, follow-

ing the semicolon after the street address, the declaration also states, 'or as Lots 1877 and 1878 of Tract Number 5134,' which was an incorrect legal description of Number 740-742 Junipero Avenue. The property was further identified as a duplex.

"It is conceded in appellants' brief that 'the street address alone would be sufficient as a description for the purpose of homestead,' but it is contended that here 'we have two complete descriptions of two entirely different properties'; for which reason the declaration is fatally defective.—

"It is true that a valid homestead declaration should contain a reasonably correct description, but it is not true that absolute perfection is required. In the instant case the street number is correctly given and no one could be misled by believing that any property was intended other than 740-742 Junipero Street.—"

Richie v. Anchor Casualty Company, 135 Cal. App. 2d 245. The opinion in this matter is written as was that in the case of *Johnson v. Brauner* by Judge Ashburn. However, it does not concern itself with the homestead exemption problem and merely involves an interpretation of a certain comprehensive liability policy and various riders attached thereto.

Joyce v. Tomasini, 168 Cal. 234. This case does not involve a Declaration of Homestead or the formal requirements thereof and it pertains to an executory contract to lease a specified acreage of tule land. The same omitted the state or county in which the land was situated, but did give as boundaries of the land the name of individuals. The Court held that the description was so uncertain that specific performance could not be enforced. The Court indicated the uncertainties could be overcome by extrinsic

evidence that the defendant was the owner of the specific acreage, etc.

The search in the *Joyce* case was for the establishment of the intention of the parties. However, the same rule does not apply to the Jackson homestead. We must assume that the appellant wanted a homestead. We cannot read his intention into the recorded Declaration of Homestead and thus insert the description. Thus, unfortunately the appellant did no more than to say, "I want a homestead." (See *Lynch, Trustee v. Stotler, supra.*)

Marcone v. Dowell, 178 Cal. 396. We do not believe the facts in this case have any bearing whatsoever on the present problem. The decision merely indicates that a deed of conveyance which covered certain property and likewise excluded certain parts thereof as covered by a mortgage which was recorded (and without any other description thereof) could be augmented to show the intention of the parties by reference to the said recorded mortgage. To have any application on the instant case, it would almost be as if the appellant had stated in his Declaration of Homestead:

"I claim a homestead on certain property which I acquired from Smith twenty years ago and my deed was recorded. So, if any creditor or party in interest wants to know what property I am claiming to homestead on, they can go to the County Recorder's Office, attempt to locate my original deed, take the description and in effect read it into my Declaration of Homestead."

Donnelly v. Tregaskis, 154 Cal. 261. In this case cited by the appellant, the Court stated with respect to the Declaration of Homestead at page 262:

"All of this presupposes the recordation of a valid declaration of homestead—the declaration—set forth

—on the lot of land and premises situate, lying and being in the city of Vallejo, county of Solano, state of California, bounded and described as follows, to wit: 'being lot No. 14 in block No. 266, according to the map of said Vallejo made by C. W. Rowe, surveyor.' A description of the premises is required by the code as an essential to a valid declaration of homestead. (Civ. Code sec. 1263; *Jones v. Gunn*, 149 Cal. 687.) A description of the premises necessarily means such description as will serve to identify the property—No such map was produced in evidence, and the negative was shown by the defense to the effect that no such map was of record. In the absence of the production and identification of the map, it would be impossible for any person to locate the premises sought to be described.—”

In other words the decision intimates that the map might have been produced.

This apparently was not done. However, in arriving at the final decision, the above was more or less surplusage for the Court stated: “But, upon another consideration, equally beyond question, the judgment of the trial court was sound.” Defendant pleaded title by adverse possession and statute of limitations. The husband, who apparently returned to California and sought to recover the property, which had been homesteaded prior to his divorce and which had been transferred by the wife to Mrs. Tregaskis, was unsuccessful and Mrs. Tregaskis was permitted to keep her home.

Matter of Estate of Caroline Ogburn, Deceased, 105 Cal. 95. This case is commented upon in the case of *Donnelly v. Tregaskis*.

“It is contended that the declaration of homestead offered in evidence was void, because it describes no

property. This contention cannot be maintained. The declaration stated that the family then resided upon the lot and premises—and this statement, together with the description which followed, clearly enough designated the premises intended to be claimed as such homestead.”

The description set forth in the Declaration of Homestead in addition to the statement that the husband and wife were residing thereon with their family was as follows:

“Situated on Main Street, of the village of Woodland, and being the western part of lot No. (5) five of said village as laid out by F. S. Freeman’s division of said village, the same being thirty-seven feet front on Main Street of said village of Woodland, and extending back with parallel lines one hundred and ninety feet deep, it being a part of the southeast quarter of section 21, in Township No. 10, of range 2 east.”

Other than this fact of recitation of residence in both cases, we see no other similarity either in the facts or on the law with the Jackson Declaration of Homestead.

Ornbaum v. His Creditors, 61 Cal. 455. This case involved state court insolvency proceeding before the Bankruptcy Act of 1898 and particularly the validity of a recorded Declaration of Homestead. The description therein recites that the homestead was bounded as follows:

“On the north by Ranchera Creek; on the east by the ranches of Robert Stubblefield and Paddy Adams; on the south by what is known as Redwood Mountains, and on the west by Camp Creek. That said boundary embraced about eleven hundred acres. That at the time said declaration was filed the lands were Government lands of the United States.”

The Court held that the necessary essentials or formal requirements were present and that the homestead was valid and as to the description observed:

“It would be sufficient to pass the land in a conveyance, and we do not think the Act of April 28, 1860—require a more particular description in a Declaration of Homestead than is required in a deed. It would be a novel proposition of law in this State, that a mountain, or range of mountains, is not a definite boundary of land, etc.”

We certainly do not believe this case is authority for the inserting of a description in the Jackson homestead when none existed in the instrument as recorded.

The Following Additional California Cases Comment Upon the Sufficiency or Insufficiency of the Declaration of Homestead.

Schuyler v. Broughton, 76 Cal. 524. A statement in the Declaration of Homestead that the value of the land is “not to exceed sixteen hundred dollars” was held to be sufficient to meet the said formal requirement of Section 1263 of the Civil Code. This case also determined the formal requirement of the Section with respect to the description of the property was met with the following description:

“The lot of land and premises situated in the Lompoc valley, county of Santa Barbara, state of California, bounded and described as follows: Being the northwest quarter of subdivision No. 11, as laid down on the official map of Lompoc Valley Land Company’s lands, and contains forty acres of land, more or less.”

In addition to the above cases, we cited the following cases in our Memorandum filed with the District Judge on the occasion of the review, to wit:

Strangman v. Duke, 140 Cal. App. 2d 185. Declaration of Homestead by wife (which did not contain a statement that the husband had not made a declaration) is void.

At first blush, this seems a rather harsh interpretation. It might be said that the negative fact that the husband had not filed a Declaration of Homestead could be ascertained by looking in the records of the County Recorder's Office in somewhat the same manner as the appellant here insists could be done to supplement the original declaration. But, it must be kept in mind that this would take a search of the County Recorder's Office in every county in the State of California before the negative result could be conclusively shown.

Olds v. Thorington, 47 Cal. App. 355. Failure to state in declaration that declarant was living on premises made the declaration imperfect and void.

Harris v. Duarte, 141 Cal. 497. Description of the premises on which the declarant resided was not the exact one as set forth in the declaration. The Court held the error to be fatal, stating:

“A Declaration of Homestead must contain a description of the premises claimed and a statement that the person making it is residing on the premises described.”

Carey v. Douthitt, 140 Cal. App. 409. “The sufficiency of a Declaration of Homestead must be determined from the statement expressly made therein and cannot be affected by any secret intention which may have been in the mind of declarant.”

United States District Judge Affirms Order of Referee (No Appeal).

In re Mapes, 120 Fed. Supp. 316. This 1954 decision of United States District Judge Ernest A. Tolin, Southern District of California, Central Division affirmed an Order of the Referee. From the decision at page 317:

“State exemption statutes generally receive ‘* * * the most liberal construction which the courts can possibly give them.’—

“Of equal dignity with this rule is the sequela that the District Court is bound to accept the State law as it has been declared by the California courts. *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188—

“The attempt is to procure from the District Court a more liberal construction of the Homestead Law than the courts of California have consistently followed.—

“In construing a preceding, and very similar, section of the Code, the California Supreme Court said (in 1880) that provisions prescribing what shall be contained in a declaration of homestead are mandatory and not merely directive, and that compliance with them is essential to the validity of the homestead. The Court indicated that although such statutes might be generally subject to a liberal construction, the language ‘must contain’ is plain and requires no construction. *Ashley v. Olmstead*, 54 Cal. 616.”

The Court concluded that the failure to give in the Declaration of Homestead of the seemingly unimportant point of the “formal requirement” of the (1)—name of the wife) rendered the Declaration of Homestead ineffectual and void.

It is conceded that many California cases refer to the homestead statute as “a remedial measure and to be liberally construed.” (*Schuyler v. Broughton*, 76 Cal. 524.) This rule of course has its limitations and we know of no instance where such liberality has done away with the requirements of the statute to the point of eliminating one of the “formal requirements” of the declaration.

Section 1263(5) of the Civil Code in part provides for the statement in the declaration that: “No former declaration has been made, or, if made, that it has been abandoned.” Obviously this does not necessarily refer to a declaration on the same property. In California, if at the time of recording the declaration, the person resides on the property and later moves off the homestead is valid forever and can only be lost by transfer or recorded abandonment.

So the question to be answered is in effect: “Do you have any valid and outstanding declaration on this or any other property in California?”

In speaking of liberal construction, non-essentials, etc., it is quite likely that if the above question was answered “no” or “none” and then it appeared to the contrary that the declarant had in years past had a homestead which had been released by sale or by recorded abandonment, that the failure to mention this additional fact (although suggested by the statute) was of no particular importance and a “liberal” construction of the statute could very well condone the omission. It is as to matters of this character that the liberality rule operates and not as suggested by appellant, to waive any of the so-called “formal requirements” of the declaration.

Conclusion.

Is the Rule Harsh or Unfair?

We must admit that the rule which is clearly stated by the California Courts as above pointed out (*i. e.*, that the “formal requirements” as required by the statute must be complied with) is a firm and positive rule. Not that it is not an unfair rule, although compliance is imperative and failure is fatal.

But, it is not an unfair rule.

Exemption Statutes—Rights to the Debtor, but Also Rights to the Creditor.

The legislative enactments upon the subject of exemptions is a grant to the debtor and a deprivation as against the creditor.

In any one of the above cases, outside evidence could no doubt have been brought forward to show the intention of the declarant or to provide the omitted portion, such as:

1. The name of the wife or husband;
2. The “actual cash value” of the property;
3. The description;
4. The fact as to any other declaration;
5. The fact of residence on the property;

The fact that declarant is required insofar as homestead exemptions are concerned that the debtor furnish the creditor body with certain information in recorded form open to the world. This information (*i. e.*, the right to information to the creditor) is the basis and necessity for the “formal requirements” of the statute.

From a standpoint of production of evidence to fortify an uncertain document, one might assume that the inten-

tion of the declarant, the description of the property, the value thereof, the name of the wife, the fact as to whether or not there was a present outstanding declaration, etc., might be brought forward to explain deficiencies of the recorded declaration.

As originally enacted in 1872, subdivision 3, Section 1263, required "a description of the premises." Section 1263 has been amended a number of times, in 1873-74, 1901, 1905, 1927, 1943, and 1953. See West's Annotated California Codes, page 242, Civil Code Vol. 8. If at any time the Legislature had intended to change the requirement of a description of the real property, it would have been very simple to have made it read "(3) a description of the premises; (or reference to former homesteads abandoned which contain a reasonable description of the property)." (Parenthetical matter ours.)

However, as pointed out in the above cases, it is not possible to thus fortify an imperfect declaration. Why must Declarations of Homestead be recorded? For the information of the creditor world and those dealing with a person who desires to place the asset beyond the reach of creditors.

We will attempt to set forth the reason why such evidence cannot be used to breath life into an imperfect declaration and we will concede that in the law of contracts where the search is for the intention of the parties, evidence thereon can be brought forward to supply the deficiencies. Why cannot a person file a declaration which merely states: "I want a homestead"?

The reason is this: exemptions are in effect road blocks or detours in the debtor-creditor commercial world. The Legislature thereby takes a very substantial right from the creditor.

Several of the cases above referred to comment on the rights of creditors to rely upon the declaration as recorded without the necessity of further search or investigation. And that concomitant right passed to the creditors when the right of recourse against the homesteaded property passed from them.

It is a rule of logic and fairness. It is firm, but not harsh or unfair and most certainly it is not a "rule of law resting on maudlin sentimentalism."

Respectfully submitted,

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Attorneys for Appellee.

No. 15828

United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a
corporation, and WM. A. SMITH CON-
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a corporation, doing business as a joint ven-
ture under the name of Lookout Point Con-
structors, Appellants,
vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS and RACHEL CURTIS, a co-
partnership, doing business as Curtis Gravel
Company, Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellants.

RAMACCIOTTI, RATCLIFFE & JOHNSTON,

ROBERT E. RATCLIFFE,

4316 S. E. Hawthorne Blvd.,
Portland, 15, Oregon,

For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 7852

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS, and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Plaintiffs,

vs.

WM. A. SMITH CONTRACTING CO. INC. of
Missouri, a corporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Defendants.

PRE-TRIAL ORDER

This cause of action came on for pre-trial confer-
ence before the undersigned Judge of the above-
entitled Court. The plaintiffs appeared by their at-
torneys, Ramacciotti & Ratcliffe, and the defendants
appeared by their attorneys, Keane and Haessler.
The parties, with the approval of the Court, agreed
upon the following:

Agreed Facts

I.

That plaintiffs are citizens of the State of Wash-
ington.

II.

That Wm. A. Smith Contracting Co., Inc. of Mis-

souri is a corporation organized and existing under laws of Missouri. That Wm. A. Smith Contracting Co. of California is a corporation organized and existing under laws of California. That said corporations referred to were at all times referred to in pleadings joint adventurers doing business as Lookout Point Constructors.

III.

That on or about January 31, 1951, defendants entered into a prime contract with the United States of America. A copy of said contract with addenda, invitation for bids, etc., is attached to this Pre-Trial Order as Exhibit 1. It is stipulated between the parties that said Exhibit 1 constitutes the prime contract referred to herein.

IV.

That on or about June 10, 1951, the parties entered into an agreement of sub-contract, a copy of said sub-contract of June 10, 1951 is attached to this Pre-Trial Order as Exhibit 2. It is hereby stipulated between the parties that said Exhibit 2 is a true copy of the sub-contract between the parties.

V.

That a plat of location of Lookout Point Reservoir, attached to this Pre-Trial Order as Exhibit 3, is stipulated between the parties to be a plat of the said area.

VI.

That it is stipulated between the parties that pho-

tographs offered in evidence by either party will be deemed properly identified if they are identified as to the subject photographed without need for calling the person who actually handled the camera when the pictures were taken.

VII.

That the dealings between plaintiffs and defendants which were consummated in the sub-contract of June 10, 1951 began in March of 1951.

VIII.

That plaintiffs did, prior to December 15, 1951, procure, manufacture and stockpile fifty-eight thousand four hundred and thirty-four (58,434) cubic yards of ballast material.

IX.

That at the contract price of Two Dollars and Twenty Cents (\$2.20) per cubic yard, plaintiffs would have been entitled to ($\$2.20 \times 58,434$ cubic yards) One Hundred Twenty-Eight Thousand Five Hundred Fifty-Four Dollars and Eighty Cents (\$128,554.80).

X.

That defendants paid plaintiffs One Hundred Sixteen Thousand and Eight Hundred and Twelve Dollars and Three Cents (\$116,812.03) on account ballast leaving a difference of Eleven Thousand Seven Hundred Forty-Two Dollars and Seventy-Seven Cents (\$11,742.77) as claimed by plaintiffs.

XI.

That of the sum of \$11,742.77, \$9,872.70 represents the amount withheld by defendants from plaintiffs on account the claimed extra cost of procuring ballast from commercial sources, and the remaining portion of the said \$11,742.77 represents the cost of placing cars under the ballast loader in the stockpile area and certain small items.

XII.

That plaintiffs moved cars to the ballast loader until approximately the 19th day of April, 1952, and that the defendants moved cars to the said loader thereafter.

XIII.

That it is stipulated between the parties that if it is determined that the plaintiffs are entitled to payment for moving cars, they are entitled to the principal sum of \$1,961.81, and if it is determined that the defendants are entitled to payment for moving cars, they are entitled to the sum of \$1,874.88.

XIV.

That the breakdown on the item of \$9,872.70, as set out in preceding paragraph is as follows:

12,837.07 c.y. of ballast purchased at	
Springfield @ \$1.75 per c.y.....	\$22,464.87
Setting up crusher at Springfield...	136.94
Freight on 211 cars of ballast from	
Springfield to Jasper.....	13,146.18
Extra train hauls from Jasper to...	2,366.26
	<hr/>
Total Cost extra ballast.....	\$38,114.25

Less 12,837.07 c.y. @ 2.20..... (28,241.55)

Net \$ 9,872.70

XV.

That if the reporter present at the hearing had before the Claims and Appeals Board, U. S. Corps of Engineers, on May 10 and May 11, 1954 in Portland, Oregon, were called, said reporter would testify that the transcript of testimony thereof, listed on plaintiff's list of exhibits as #1, is a true and correct transcript and record of the questions propounded, the answers given thereto, the statements made by the parties designated as having made such statements, and of the proceeding had at said time and place. This stipulation is not intended in any manner to effect the admissibility of said transcript, and defendants expressly reserve their right to object to the admissibility thereof.

XVI.

That the following are authorized agents of plaintiffs, and had authority to bind plaintiffs by their action:

Marland Curtis, Rexford B. Stuart, D. E. Thompson.

That the following are authorized agents of defendants, and had authority to bind defendants by their action:

L. W. Huncke, Harry G. Moore, D. M. Salm, William Martin.

Plaintiffs' Contentions of Fact

I.

That defendants promised and agreed to furnish plaintiffs information as to the quantity of ballast required so as to enable plaintiffs to produce and stockpile said quantity by completion date set forth in the sub-contract agreement of these parties dated June 10, 1951.

II.

That plaintiffs did manufacture and stockpile ballast material in a quantity in excess of 4.3% of the quantity estimated in the prime contract referred to in the sub-contract of these parties.

III.

That defendants were fully advised as to the quantity of ballast stockpiled and as to plaintiffs' intention to dismantle their crushing plant, but that defendants' only objection to the dismantling thereof and the quantity of ballast produced was on the basis of a rejection of some of the ballast.

IV.

That none of the ballast stockpiled by plaintiff was rejected.

V.

That the custom and usage of the trade require that defendants advise plaintiffs of the quantity of ballast required.

VI.

That the sub-contract of these parties provides

for a definite completion date of plaintiffs' crushing activities.

VII.

That after plaintiffs' crushing plant had been dismantled, defendants entered into an agreement, secret as to plaintiffs, with the railroad and the U. S. Corps of Engineers, requiring the use of approximately 9,000 additional cubic yards of ballast material. That said additional ballast was not set forth or contemplated in either the prime contract or the sub-contract of these parties.

VIII.

That defendants, on their own behalf, filed a claim with the U. S. Corps of Engineers for reimbursement on account the additional cost of procuring ballast material, said additional cost representing the same sum that defendants withheld from plaintiffs.

IX.

That the U. S. Corps of Engineers has approved and authorized payment of the sum of \$1,845.65 on account the extra cost incurred by defendants in procuring additional ballast.

X.

That the town of Jasper, Oregon, is on "the Southern Pacific relocated main line" as referred to in the sub-contract of these parties.

XI.

That the custom and usage of the trade required defendants to move railroad cars for loading.

XII.

That defendants refused to compensate plaintiffs for their expenses in moving railroad cars for loading and plaintiffs thereupon withdrew from such activity.

XIII.

That plaintiffs incurred expenses in the sum of \$1,961.81 in moving railroad cars for loading.

XIV.

That on and before September 25, 1952, plaintiffs made demand on defendants for payment of the sum of \$17,085.28, representing the reasonable value of labor, equipment and services furnished by plaintiffs to defendants outside the scope of the sub-contract of these parties, said claim being composed of:

Standby Equipment	\$12,959.51
Cleaning Culvert	123.40
Ballast Loading—Standby Equipment	1,500.00
Excavating Sub-Grade and Reshaping	2,502.36

XV.

That defendants agreed to and did submit plaintiffs' claim in said sum of \$17,085.28 to the U. S. Corps of Engineers on behalf of plaintiffs.

XVI.

That on April 1, 1953, the U. S. Corps of Engineers allowed and paid to defendants the sum of

\$14,582.92, which sum represented the claims submitted on behalf of plaintiffs on account:

Standby Equipment	\$12,959.52
Cleaning Culvert	123.40
Ballast Loading Standby Equipment	1,500.00

XVII.

That all the equipment, labor and services for which defendant received the sum of \$14,582.92 were furnished by plaintiffs.

XVIII.

That defendants have at all times prior to October, 1955, acknowledged plaintiffs' right to said sum of \$14,582.92.

XIX.

That the quantity of ballast manufactured by plaintiffs, to wit: 58,434 cubic yards, for defendant, and the estimated quantity as stated in the subcontract, to wit: 56,000 cubic yards, were determined by measurement in the hauling vehicle at the point of delivery.

XX.

That defendants submitted its claim to the U. S. Corps of Engineers on account additional cost of procuring ballast material as its own claim and not on behalf of plaintiffs.

XXI.

That defendants failed to commence ballasting

prior to plaintiffs' removal of crushing plant although four and one-half miles of completed sub-grade were available.

XXII.

That defendants procured permission from the U. S. Corps of Engineers without advice or notice to plaintiffs, to delay ballasting operations until April, 1952, although, if ballasting operations had been commenced as per defendants' prime contract, the total requirements for completion of the work could have been accurately estimated.

XXIII.

That the sub-contract of these parties, providing for the furnishing of all required ballast and further providing that the ballast shall be stockpiled by a date certain, is ambiguous.

Defendants' Contentions of Fact

I.

That plaintiffs agreed to furnish ballast and road topping material to defendants in accordance with the terms of a sub-contract entered into by and between the parties on June 10, 1951.

II.

That in order to provide agreed ballast and road topping material, plaintiffs erected a rock crushing plant and stockpile at Dexter, Oregon. Said location was designated as "Borrow Area 'B'" and was an approved area under the general contract between defendants and the United States, although

plaintiffs were not obliged to use the site, and did so on their own option.

III.

That plaintiffs removed their rock crushing plant from Borrow Area "B" before the job was completed, and before sufficient ballast and road topping had been manufactured to supply the needs of the job.

IV.

That plaintiffs removed its plant in order to amass additional profits from another job which was independent of its sub-contract with defendants.

V.

That plaintiffs removed their plant without permission from defendants, and without obtaining permission from the Contracting Officer of the U. S. Army Engineers.

VI.

That defendants strenuously warned plaintiffs that the latter would be held responsible for any costs resulting from the early removal of the rock crushing plant.

VII.

That plaintiffs knew that the estimated quantities referred to in the prime contract and sub-contract were merely estimates, and that plaintiffs were obligated to deliver all gravel required under the terms of the job.

VIII.

That the amount of ballast and road topping re-

quired on the job cannot be accurately estimated in advance because material delivered pursuant to the contract is measured in "loose fill" in cars, while ballast distributed on the right of way is "compacted fill", and the amount of loose fill which settles into a cubic yard of compacted fill is indeterminate and varies with conditions of crushing, loading, and application.

IX.

That plaintiffs failed to provide all of the materials required to complete the agreed job.

X.

That because of plaintiffs' failure, defendants were forced to procure 12,837.00 yards of ballast material from commercial sources at a price of \$.769 per cubic yard in excess of the sub-contract price, and to transport same resulting in a total cost of \$9,872.70.

XI.

That because of plaintiffs' failure to provide agreed ballast, defendants were forced to incur direct labor expenses in the sum of \$460.00 and indirect costs in the sum of \$1,168.00.

XII.

That prior to plaintiffs' removal of its rock crushing equipment from Borrow Area "B", both plaintiffs and defendants interpreted the sub-contract as requiring plaintiffs to place cars for loading.

XIII.

That under industry custom and usage, plaintiffs were obligated to move cars in place for loading.

XIV.

That the method of loading the cars was under plaintiffs' control.

XV.

That plaintiffs placed cars for loading of ballast without claiming compensation therefor until after removal of its rock crushing equipment.

XVI.

That on April 18, 1952, plaintiffs withdrew their car moving equipment, and refused to load any more cars, so that defendants were compelled to move cars for loading, and incurred costs hereinbefore stipulated.

XVII.

That any delays in the estimated progress of the work contemplated under the prime contract and sub-contract were at the instance of the United States government and were not occasioned by any neglect or failure on the part of defendants.

XVIII.

That the completion dates set forth in the prime contract and sub-contract were for the benefit of the United States government and could and were in fact waived by the United States.

XIX.

That both plaintiffs and defendants were obli-

gated to complete the agreed job without regard to the completion dates set forth in the contract for the benefit of the United States of America.

XX.

That plaintiffs have never furnished defendants with the Release required under the terms of the prime contract and sub-contract.

Plaintiffs' Contentions of Law

I.

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention in the interpretation of the language of the contract.

II.

Parties who contract on subject matter concerning which known usages prevail by implication incorporated them into their agreements, and usages and customs may qualify the meaning of a contract otherwise ambiguous, add incidents not in contradiction of the fundamental provisions of the contract, and supply omissions under certain circumstances which have occurred in the agreement of the parties.

III.

Surrounding circumstances existing at the time a contract is entered into must be examined for an interpretation of the intent of the parties.

IV.

The interpretation given a contract by the parties

themselves is to be accorded great, if not controlling, weight in understanding their intention at the time of execution of the agreement.

V.

Where the parties to a special contract deviate from the original plan agreed upon and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as a work wholly extra, outside the scope of the contract, and may be recovered for as such. A contractor may recover the reasonable value of additional work necessitated by a material change of specifications.

VI.

If the failure of one party to fulfill the terms of its contract is attributable to or caused by the breach of contract or duty of the other party, the former party has a right of action on the contract notwithstanding such nonperformance.

VII.

That a party invoking a remedy appropriate to a certain state of facts thereby elects his remedy and cannot thereafter invoke a remedy appropriate to an inconsistent state of facts.

VIII.

Whenever a debtor is in default for not paying money in pursuance of his contract, the creditor is

entitled to indemnity in a sum of not less than the specified amount of money with interest from the time of the default until the obligation is discharged. Interest on money runs from the time when the money becomes due and payable.

Defendants' Contentions of Law

I.

That plaintiffs committed a partial breach of the sub-contract by withdrawing crushing equipment from Borrow Area "B".

II.

That plaintiffs committed a partial breach of the sub-contract by failing to provide the gravel necessary for the job.

III.

That defendants were entitled to damages resulting from plaintiffs' partial breach of the sub-contract.

IV.

That it was proper for defendants to attempt to mitigate the damages resulting from plaintiffs' partial breach of the sub-contract.

V.

That the rights of both parties are covered by the terms of said sub-contract.

VI.

That plaintiffs were obligated to furnish defendants with a Release as a condition precedent to any final payment under the sub-contract.

VII.

That neither party is entitled to interest on sums claimed from the other one because the respective rights and obligations of the parties are contested and are indefinite and uncertain.

Stipulation Regarding Exhibits

1. Plaintiffs' list of exhibits and Defendants' list of exhibits are appended to this Pre-Trial Order and incorporated herein by reference.

2. It is hereby stipulated and agreed between the parties that copies of documents and correspondence may be received in evidence in lieu of the original document, and that all exhibits listed and appended hereto may be received without objection as to identification; provided, however, that both parties reserve the right to object otherwise to the relevancy or competency of any exhibit.

Signature.

This Pre-Trial Order having been agreed upon and submitted by counsel for both parties on this 30th day of January, 1956, is hereby accepted by both parties and the Court.

/s/ WILLIAM G. EAST,
United States District Judge.

KEANE AND HAESSLER,
/s/ ERIC R. HAESSLER.

/s/ ROBERT E. RATCLIFFE for
RAMACCIOTTI AND
RATCLIFFE,

/s/ ROBERT E. RATCLIFFE.

Plaintiffs' List of Exhibits

1. Transcript of Testimony given at Hearing before U. S. Corps of Engineers, Claims and Appeals Board, on May 10 and May 11, 1954.

2. Letters:

A. Date: 9/14/51. From Curtis Gravel Co., to W. A. Smith Contracting Co.;

B. Date: 9/21/51. From Lookout Point Construc., to Curtis Gravel Co.;

C. Date: 11/24/51. From Curtis Gravel Co., to Lookout Point Constructors;

D. Date: 3/14/52. From W. A. Smith Contr. Co., to Curtis Gravel Co.;

E. Date: 4/5/52. From Curtis Gravel Co., to Lookout Point Constructors;

F. Date: 4/14/52. From Lookout Point Constr., to Curtis Gravel Co.;

G. Date: 9/25/52. From Lookout Point Constr., to Corps of Engineers;

H. Date: 1/19/53. From Lookout Point Constr., to Corps of Engineers;

I. Date: 2/23/53. From Lookout Point Constr., to Corps of Engineers;

J. Date: 3/16/53. From Lookout Point Constr., to Corps of Engineers;

K. Date: 6/29/53. From Lookout Point Constr., to Corps of Engineers.

3. Vicinity Map, Lookout Point Reservoir, prepared by U. S. Corps of Engineers.

4. U. S. Corps of Engineers' Change Order #23.

Defendants' List of Exhibits

1. General Contract between Lookout Point Constructors and the United States of America, together with invitation for bids, specifications and price list, etc., dated January 31, 1951.

2. Subcontract between Lookout and Curtis dated 6/10/51.

3. Plat of area prepared by U. S. Engineers.

4. Letters:

a. Date: 9/12/51. From Lookout Point Constructors, to Curtis Gravel Co.;

b. Date: 9/17/51. From Lookout Point Constructors, to Curtis-Gravel Co.;

c. Date: 9/25/51. From Curtis Gravel Co., to Wm. A. Smith;

d. Date: 11/16/51. From D. Salm, to L. W. Huncke;

e. Date: 11/24/51. Curtis Gravel Co., to Lookout Point Constructors;

f. Date: 12/3/51. From Lookout Point Constructors, to Curtis Gravel Co.;

g. Date: 11/26/51. From L. W. Huncke, to W. A. Martin;

h. Date: 12/5/51. From D. Salm, to L. W. Huncke;

i. Date: 2/4/52. Curtis Gravel Co., to Lookout Point Constructors;

j. Date: 2/26/52. From Lookout Point Constructors, to Curtis Gravel Co.;

k. Date: 3/14/52. From Wm. A. Smith, to Curtis Gravel Co.;

l. Date: 3/29/52. From Lookout Point Constructors, to Curtis Gravel Co.;

m. Date: 4/5/52. From Curtis Gravel Co., to Lookout Point Constructors;

n. Date: 4/14/52. From Lookout Point Constructors, to Curtis Gravel Co.;

o. Date: 5/8/52. From Lookout Point Constructors, to Curtis Gravel Co.

5. Telegrams:

a. Date: 5/9/52. From Wm. A. Smith Co., to Curtis Gravel Co.;

b. Date: 5/13/52. From Lookout Point Constructors, to Curtis Gravel Co.

6. Invoice:

Date: 6/16/52. From Lookout Point Constructors, to Curtis Gravel Co.

7. Letters:

a. Date: 5/16/52. From Lookout Point Constructors, to Curtis Gravel Co.;

b. Date: 4/16/52. From D. Salm, to L. W. Huncke;

c. Date: 4/30/52. From D. Salm, to L. W. Huncke;

d. Date: 9/26/52. From Curtis Gravel Co., to Wm. A. Smith Co.;

e. Date: 9/26/52. From Ramacciotti & Ratcliffe, to Lookout Point Constructors;

f. Date: 9/26/52. From D. M. Salm, to L. W. Huncke;

g. Date: 12/5/52. From Lookout Point Constructors, to Ramacciotti & Ratcliffe;

h. Date: 1/19/53. From Lookout Point Constructors, to Corps of Engineers;

i. Date: 1/26/53. From Corps of Engineers, to Corps of Engineers;

j. Date: 10/14/51. From D. Salm, to L. W. Huncke;

k. Date: 9/14/51. From Curtis Gravel Co., to Wm. A. Smith Co.

[Endorsed]: Filed Jan. 30, 1956.

[Title of District Court and Cause.]

MEMORANDUM OPINION

East—Judge.

Having considered the evidence adduced by the parties, respectively, and the briefs submitted by counsel, the Court is of the opinion:

1. That the defendants, as prime contractors, failed to furnish the plaintiff with a final quantity requirement so that the plaintiff could reasonably supply the required stockpile of ballast material from their arranged sources within the time contemplated by the sub-contract and the understand-

ing of the parties, and that plaintiff fully performed that part of its contract to be performed on its part as to quantity of ballast material to be furnished.

The defendant has no legal or equitable right to withhold payment to plaintiff of the sum of \$9,872.70 on the alleged ground of additional cost of securing ballast material upon alleged default on the part of plaintiff, in that the purchase of ballast material by the defendant from commercial sources was without fault or negligence on the part of the plaintiff.

Therefore, plaintiff is entitled to recover from the defendant the amount of \$11,742.77, less the amount of \$1,874.88, or the resulting sum of \$9,867.87, together with interest thereon at the rate of six per cent per annum from the date of the last payment made by the defendant to plaintiff upon the contract.

As to the allowance of interest, see *Public Market Co., vs. City of Portland*, 171 Ore. 522, at page 625.

2. That the plaintiff was obligated to move the cars for loading of ballast material and is not entitled to reimbursement therefor, and that defendant is entitled to withhold as an offset from amounts due the plaintiff the stipulated sum of \$1,874.88, on account of expense of moving cars as aforesaid.

3. That the defendant, in connection with its presenting and prosecution of its claim against the Corps of Engineers under Change Order No. 23,

Supplement 1, was acting for and on behalf of the plaintiff. That the defendant is entitled to have and receive a sum equal to five per cent of the award for administrative costs and expense and an additional sum equal to one per cent, bond expense. Therefore, plaintiff is entitled to have and recover of and from the defendant the sum of \$14,582.92 less six per cent thereof, to be retained by the defendant, together with interest on the resulting balance at the rate of six per cent per annum from April 1, 1953, the date of payment to the defendant by the Corps of Engineers, until paid.

Counsel for the plaintiff is requested to submit proposed Findings of Fact, Conclusions of Law and Judgment in conformity with the foregoing and counsel for the defendant are allowed ten (10) days from date of receipt within which to file their objections if any to said proposed Findings.

Dated, March 4, 1957.

[Endorsed]: Filed March 4, 1957.

[Title of District Court and Cause.]

FINDING OF FACT AND CONCLUSIONS
OF LAW

The above entitled action came on regularly for trial on the 30th day of January, 1956, before the Honorable William G. East, Judge, a jury having been expressly waived by the parties. The plaintiffs appeared by Albert L. Ramacciotti and Rob-

ert E. Ratcliffe, their attorneys, and personally by Marland Curtis; and the defendants appeared by Gordon H. Keane and Eric G. Haessler, their attorneys. The Pre-Trial Order, approved by the parties through their respective attorneys of record, was signed and entered of record. Evidence of plaintiffs and defendants was heard and received, after which both parties rested. Oral arguments were waived, and written arguments were submitted by the attorneys of record for the parties herein. The matter was taken under advisement by the Court, and thereafter the Court rendered its decision and in accordance therewith the Court hereby makes and enters the following:

Findings of Fact

I.

The plaintiffs are citizens and residents of the State of Washington; the defendant Wm. A. Smith Contracting Co., Inc., of Missouri, is a Missouri corporation; the defendant Wm. A. Smith Contracting Company of California is a California corporation; and the matter and amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

The defendants were, at all times pertinent hereto, engaged as joint adventurers under the name and style of Lookout Point Constructors.

III.

That on the 10th day of June, 1951, the parties

hereto entered into an agreement of sub-contract, the terms of which required, in part, that plaintiffs stockpile a quantity of ballast material estimated to be 56,000 cubic yards.

IV.

That it was the intention, agreement and understanding of these parties that defendants furnish plaintiffs with information as to final quantity requirements of ballast material so that plaintiffs could reasonably supply the required stockpile of ballast material within the time contemplated by the sub-contract agreement aforesaid.

V.

That defendants failed to furnish plaintiffs with information as to final quantity requirements of ballast material within the time contemplated by the sub-contract agreement.

VI.

Plaintiffs stockpiled 58,434 cubic yards of ballast material by December 15, 1951, and were entitled to payment therefor in the sum of \$128,554.80. Defendants paid to plaintiffs for said ballast material \$116,812.03, and retained the balance, to-wit: \$11,742.77.

VII.

The sum of \$11,742.77 retained by defendants as aforesaid represented defendants' alleged additional cost of procuring ballast material from commercial sources to meet their requirements, and the addi-

tional sum of \$1,874.88 expended by defendants in moving railroad cars for loading.

VIII.

Plaintiffs were without fault or neglect in stockpiling a quantity of ballast material insufficient to satisfy defendants' requirements.

IX.

The last payment due from defendants to plaintiffs on account ballast material was paid on December 17, 1952.

X.

The prime contract between the defendants and the United States Government was altered, extended, and changed during the course of construction, and by reason of said changes, plaintiffs were called upon to furnish stand-by equipment, perform extra services and furnish extra materials outside the scope of the sub-contract agreement of these parties. The reasonable value of said services and materials was \$14,582.92.

XI.

Defendants presented a claim to the United States Government, through the Corps of Engineers, for payment on account the extra services and material furnished by plaintiffs as aforesaid, and said claim was approved and allowed. On April 1, 1953 defendants received payment in the sum of \$14,582.92 from the United States Corps

of Engineers on account said claim for extra services and materials furnished by plaintiffs.

XII.

Defendants were acting for and on behalf of plaintiffs in presenting the aforesaid claim to the United States Government.

XIII.

The reasonable value of defendants' services for administrative expense in presenting the aforesaid claim to the United States Government is a sum equal to 5% of the award, to-wit: \$729.14, together with an additional sum equal to 1% of the award for bond expense, to-wit: \$145.83.

XIV.

The sum of \$9,867.87 for ballast material withheld by defendants from plaintiffs since December 17, 1952, and the sum of \$14,582.92, less 5% for defendants' administrative costs and 1% for bond expense, owing from defendants to plaintiffs since April 1, 1953, are both sums easily ascertainable by simple computation, or by reference to generally recognized standards, and the dates of defendants' default in failing to remit said sums to plaintiffs are as set forth above, and are fixed and easily determinable.

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following:

Conclusions of Law

I.

The above entitled Court has jurisdiction of these parties and of this cause.

II.

The agreement of these parties as to the manufacture and stockpiling of ballast material required that defendants furnish plaintiff with a final quantity requirement within the time contemplated by the sub-contract so as to enable plaintiffs to stockpile said quantity within said time. Any deficiency in defendants' requirements for ballast material was without fault or neglect on the part of plaintiffs and was resultant from defendants' failure to advise plaintiffs of final quantity requirements within the time contemplated by the sub-contract agreement.

III.

The plaintiffs fully performed that part of its sub-contract agreement with defendants as to quantity of ballast material to be furnished.

IV.

Defendants have no legal or equitable right to withhold payment to plaintiffs of any part of the full amount owing under the terms of the sub-contract agreement on account ballast material stockpiled and delivered by plaintiffs to defendants, and defendants wrongfully withheld the sum of \$9,867.87 on account payment for ballast material, which sum should have been paid by December 17, 1952.

V.

Defendants are entitled to continue to retain the sum of \$1,874.88 on account their stipulated cost of moving railroad cars, and plaintiffs are not entitled to recover anything from defendants on account their claim for expense incurred in moving railroad cars for loading ballast material. The terms and language of the sub-contract agreement impose upon plaintiffs the obligation to move railroad cars for loading without additional cost to defendants.

VI.

The standby equipment, extra services and extra materials furnished by plaintiffs and for which defendants received in satisfaction of a claim submitted on behalf of plaintiffs to the United States Government the sum of \$14,582.92 embodied work and material outside the scope of the sub-contract agreement of these parties.

VII.

Defendants were acting for and on behalf of plaintiffs in presenting claims to the United States Government on account extra services and materials furnished by plaintiffs, and the full sum of \$14,582.92 received by defendants on April 1, 1953 from the United States Government in payment of said claims should have been paid to plaintiffs, less 5% of the award for defendants' administrative expense, and 1% of the award for bond expense.

VIII.

Plaintiffs are entitled to recover interest at the rate of 6% per annum from December 17, 1952 until paid on the sum of \$9,867.87, and interest at a like rate from April 1, 1953 until paid on the sum of \$13,707.94.

Let judgment be entered accordingly.

Dated this 6th day of May, 1957.

/s/ WILLIAM G. EAST,
Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 6, 1957.

In the United States District Court for the
District of Oregon

Civil No. 7852

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS, and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Plaintiffs,

vs.

WM. A. SMITH CONTRACTING CO. INC., of
Missouri, a coporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Defendants.

JUDGMENT

This matter came on for trial before the Honor-

able William G. East on the 30th day of January, 1956; plaintiffs appearing by Marland Curtis and by Albert L. Ramacciotti and Robert E. Radcliffe, their attorneys; defendants appearing by Gordon H. Keane and Eric R. Haessler, their attorneys; the parties expressly waived a jury; a Pre-Trial Order was duly signed by the Court and entered of record; testimony of the parties was presented and admitted and argument of respective counsel was heard; the parties thereafter rested and the Court took the matter under advisement; the Court thereafter rendered its decision and made Findings of Fact and Conclusions of Law.

Based upon the Findings of Fact and Conclusions of Law made and entered in the above entitled action:

It Is Therefore Ordered, Adjudged and Decreed that plaintiffs have Judgment against defendants, and each of them, in the sum of \$9,867.87, with interest thereon at the rate of 6% per annum from December 17, 1952, until paid; and the further sum of \$13,707.94 with interest thereon at the rate of 6% per annum from April 1, 1953 until paid.

Dated this 6th day of May, 1957.

/s/ WILLIAM G. EAST,
Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Defendants hereby appeal to the Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on the 6th day of May, 1957 in favor of the Plaintiffs and against the Defendants wherein judgment was given against Defendants and each of them in and for the sum of \$9,867.87, together with interest at the rate of 6% per annum from December 17, 1952 until paid, and for the allowance of interest only upon the sum of \$13,707.94 at the rate of 6% per annum from April 1, 1953 until paid.

Dated June 3rd, 1957.

/s/ GORDON H. KEANE,
/s/ ERIC R. HAESSLER,
KEANE AND HAESSLER,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 4, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That the National Surety Corporation, a corporation created, organized and existing for and by vir-

tue of the laws of New York, having its principal place of business in New York, New York, and duly authorized to carry on a general casualty insurance business within the State of Oregon and in the Courts of the United States, is held and firmly bound unto Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, the Plaintiffs, in the full and just sum of Twenty Thousand and No/100 Dollars (\$20,000.00) to be paid to said administrators, executors, successors or assigns of Plaintiffs, Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 3rd day of June, 1957.

Whereas, on May 6, 1957, in an action pending in the United States District Court for the District of Oregon between Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company as Plaintiffs, and Wm. A. Smith Contracting Co. Inc., of Missouri, a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors as Defendants, Civil Action No. 7852, final judgment was entered in favor of said Plaintiffs and against said Defendants for the sum of \$9,867.87 with interest thereon at the rate of 6% per annum from December 17,

1952, until paid, and for the further sum of \$13,707.94 with interest thereon at the rate of 6% per annum from April 1, 1953, until paid; and the said Defendants having filed a Notice of Appeal from a part of said judgment, namely, the judgment for \$9,867.87 with interest thereon at 6% per annum from December 17, 1952, until paid, and the judgment for interest at 6% per annum upon the sum of \$13,707.94 from April 1, 1953, until paid, to the United States Court of Appeals for the Ninth Circuit;

Now Therefore, the condition of this obligation is such, that if the said Defendants, Wm. A. Smith Contracting Co. Inc., of Missouri, a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, shall prosecute the appeal to effect and shall satisfy that part of the judgment so appealed from, together with costs, interest and damages for delays, if for any reason the appeal is dismissed, or if the judgment is affirmed, or shall satisfy in full such modification of that part of the judgment so appealed from and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] NATIONAL SURETY
CORPORATION,

/s/ By ALICE T. BIRKEMEIER,
Attorney in Fact.

Countersigned:

PHIL GROSSMAYER CO.,
Resident Agents.

/s/ By ALICE T. BIRKEMEIER.

Approved: June 4th, 1957.

/s/ WILLIAM G. EAST,
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 4, 1957.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Defendants as Appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed herein on June 4, 1957, the following portions of the record, proceedings and evidence in this action.

1. The Pre-Trial Order.
2. The Opinion of the Court.
3. The Findings of Fact and Conclusions of Law.
4. The Judgment.
5. The Notice of Appeal.
6. The Statement of Points on Appeal.
7. The Bond on Appeal.

8. This Designation.

9. The following portions of the Transcript of Testimony adduced in the trial:

* * * * *

10. Order of the Court directing transmittal of the original exhibits to the Clerk of the United States Court of Appeals for the Ninth Circuit.

KEANE AND HAESSLER,
/s/ By GORDON H. KEANE,
Attorneys for Defendants-
Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

This is an appeal from that part of the Judgment awarding Plaintiffs the sum of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87) together with interest at Six Percent (6%) per annum from December 17, 1952, until paid, arising from Defendants having been required to obtain additional ballast material from other sources, and, also, the allowance to Plaintiffs of interest upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94) at Six Percent (6%) per annum from April 1, 1953, until paid. From the remainder of said Judgment Defendants have not appealed.

The points upon which Defendants-Appellants will rely are:

1. The Court erred in failing to hold that Plaintiffs were bound under their subcontract with Defendants by the terms and conditions of the general contract between Defendants and the United States, which general contract was specifically incorporated in said subcontract by reference.

2. The Court erred in holding that Plaintiffs were not obligated to furnish all ballast material required to complete Defendants' contract with the United States.

3. The Court erred in holding that Plaintiffs were without fault or negligence in stockpiling a lesser quantity of ballast material than was necessary to complete Defendants' contract with the United States.

4. The Court erred in holding that Defendants were obligated, under the terms of their subcontract with Plaintiffs to notify Plaintiffs of the exact quantity of ballast material to be produced to complete the work contemplated by Defendants' contract with the United States.

5. The Court erred in failing to find that it would have been impossible for Defendants to anticipate the quantity of ballast material required to complete the work required under Defendants' contract with the United States prior to the date upon which the Plaintiffs dismantled their crushing plant.

6. The Court erred in holding that Plaintiffs

fully performed their subcontract with Defendants as to the quantity of ballast material to be furnished.

7. The Court erred in holding that Plaintiffs were entitled to interest at Six Percent (6%) per annum from April 1, 1953, until paid, upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94).

8. The Court erred in failing to enter judgment for Defendants with respect to Plaintiffs' demand of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87).

9. The Court erred in holding that Plaintiffs were entitled to interest at Six Percent (6%) per annum from December 17, 1952, until paid, upon the sum of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87).

KEANE AND HAESSLER,

/s/ By GORDON H. KEANE,

Attorneys for Defendants-
Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

It Appearing to the Court that on the annexed consent of the attorneys for the respective parties and good cause appearing, it is hereby

Ordered that the original exhibits in this cause be transmitted by the Clerk of this Court to the Clerk of the United States Court of Appeals for the Ninth Circuit, to be retained by the said Clerk for inspection by the Court of Appeals until final disposition of the appeal herein and then to be returned to this Court.

Dated December 12th, 1957.

/s/ WILLIAM G. EAST,
United States District Judge.

The entry of the foregoing Order is hereby consented to and notice of the entry thereof is hereby waived.

/s/ GORDON H. KEANE
Of Attorneys for Defendants-
Appellants.

/s/ ROBERT E. RATCLIFFE
Of Attorneys for Plaintiffs-
Appellees.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-Trial Order, Memorandum of Judge East, Findings

of Fact and Conclusions of Law, Judgment, Notice of Appeal, Supersedeas Bond, Motion to Extend Time for Filing Record and Docketing Appeal, Order extending time to file record and docket appeal, Designation of Contents of Record on Appeal, Statement of Points on Appeal, Order for Transmittal of Exhibits and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7852, Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, plaintiffs and appellees vs. Wm. A. Smith Contracting Co. Inc. of Missouri, a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, defendants and appellants; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcript of testimony, February 13 and 15, 1956, January 30-31, 1956 and February 1-2, 13 and 15, 1956, and February 1-2, 1956, filed in this office in this cause, together with Exhibits of plaintiff Nos. 1, 2, 10, 11, 13, 19, 20, 21 and 34, and defendants' Exhibits Nos. 1 to 8, inclusive, 14 to 18, inclusive, 21, 22, 24 to 30, inclusive, 32, 31, 33, 35, 36 and 40.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 12th day of December, 1957.

[Seal]

R. DeMOTT,

Clerk,

/s/ By MILDRED SPARGO,

Deputy Clerk.

United States District Court
District of Oregon

Civil No. 7852

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Plaintiffs,

vs.

WM. A. SMITH CONTRACTING CO. INC., of
Missouri, a corporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East, U. S. Dis-
trict Judge.

U. S. Courthouse; Portland, Oregon. January 30-
31, February 1-2, 13 and 15, 1956.

Appearances: Messrs. Albert L. Ramacciotti and

Robert E. Ratcliffe, Attorneys for Plaintiff; Messrs. Gordon H. Keane and Eric R. Haessler, Attorneys for Defendants.

(Whereupon the following proceedings were had:) [1]*

* * * * *

MARLAND G. CURTIS

produced as a witness on behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ramacciotti): Your name is Marland Curtis? A. Yes, sir.

Q. Do you reside in Spokane?

A. That's right.

Q. According to the stipulation you are one of the partners constituting the plaintiff?

A. Yes.

Q. Mr. Curtis, it has been stipulated and is incorporated into the pre-trial order here that your company manufactured 58,434 cubic yards of ballast material under a subcontract in evidence here with the defendant. A. That's right.

Q. Was it delivered to the defendant?

A. Yes, it was delivered into cars.

Q. The measurement, Mr. Curtis, was car measurement. That, I think, is stipulated.

A. That's correct.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

(Testimony of Marland G. Curtis.)

Q. Have you been paid on account the contract price for that number of yards of ballast?

A. No, we haven't. [52]

Q. According to the stipulation, there is an unpaid item of \$11,742.77. Is that the amount that is unpaid?

A. Yes, it is.

Q. On that item?

A. On that item, it is.

Q. Now, were you paid the balance of the amount due your company on account ballast?

A. On account of ballast we were.

Q. What is that?

A. We were—outside of that, I think we were paid for the rest of the ballast. [53]

* * * * *

Q. Now, your business, Mr. Curtis; that is, the business of Curtis Gravel Company, is what?

A. Most of our work has been manufacturing and stock-piling different kinds of aggregate and ballast.

Q. Have you ever been a railroad contractor?

A. No.

Q. Have you ever engaged in the matter of the placement of tracks? [55]

A. No.

Q. Or rails for the Government or for railroads?

A. No.

Q. Are you acquainted with the procedures and practices of railroad contractors with reference to the placement of their ballast?

A. Not except just what I have observed driving by a job or watching somebody else do it.

Q. In connection with this job or contract at

(Testimony of Marland G. Curtis.)

Lookout Point, did you at any time make any observations as to the requirements of gravel or ballast? A. No; because we didn't—

Q. Were you asked to check the requirements?

A. Not until, I think it was, sometime in the summer of '52.

Q. Was that before or after you had stock-piled the amount that has been referred to?

A. That was after we had stock-piled the amount that the contract called for and had removed our equipment from the site.

Q. Now, during the completion of the contract—that is, in so far as the stock-piling was concerned—did you have any correspondence with the defendant regarding the matter of the requirements for ballast?

A. Yes. We had letters and several conversations about it. [56]

* * * * *

Q. You say there were some conversations, Mr. Curtis. Do you recall when you first discussed it as to the requirements with a representative of the defendant?

A. I don't recall the exact date, no.

Q. Can you approximate the time?

A. It would be sometime during the month of October.

Q. Of 1951? A. 1951.

Q. Now, you have made mention of correspondence, and I am handing you for your inspection

(Testimony of Marland G. Curtis.)

Exhibit 2-A, which is a letter [57] dated September 14th. Was that letter written by your firm?

A. Yes, it was.

Q. That is a copy, of course. Do you know who wrote the letter? A. Mr. Thompson.

Mr. Ramacciotti: There is no dispute as to the letter?

Mr. Haessler: It has already been received in evidence.

Mr. Ramacciotti: Yes.

Q. Now, referring to the latter portion, the last paragraph, as a matter of fact, was that letter and that particular language used under your direction by Mr. Thompson? A. Yes, it was.

Q. And who was Mr. Thompson?

A. Mr. Thompson was the superintendent on the job, in charge of the job.

Q. Now, you have referred to letters. Let me ask that you look at another letter which is marked Exhibit 2-C, and please state whether or not that pertains to the ballast that we were talking about?

A. Yes, it does.

Q. And, likewise, 2-E. A. Yes.

Q. Now, with the dates of those letters in mind, Mr. Curtis, can you tell us about when it was that there was conversation in which you took part regarding the matter of the requirements [58] of ballast for this particular job? You say in October. Was there just one conversation, or were there more?

A. There was several conversations about it. I

(Testimony of Marland G. Curtis.)

wasn't on the job all the time. And whenever I went —when I visited the job, then we talked about the quantity of ballast.

Q. Who was on the job in so far as a resident or local manager, so far as the defendant was concerned? A. A Mr. Salm.

Q. Did you ever talk with him about the matter of requirements? A. Yes. [59]

* * * * *

Q. Now, Mr. Curtis, running through the Contentions of Fact of the plaintiff in the pre-trial order, there is the item of the production of ballast. The contract called for how many thousand cubic yards? A. 56,000.

Q. Your production was how many?

A. 58,400-and something.

Q. By what means was the measurement effected as to the number of cubic yards?

A. That was measured in railroad cars.

Q. Was that the basis for measurement provided for in your agreement with the defendant?

A. Yes, it was. [63]

Q. Did you make measurement in stock pile as well? A. Yes, we did.

Q. Was there any discrepancy or any variation between the measurement in cars and the stock-pile measurement?

A. Yes, there was, because stock-pile measurement was greater than the car measurement because of the loss owing when you reclaim it out of the stock pile.

(Testimony of Marland G. Curtis.)

Q. That is, some ballast at the bottom of the pile that was *lot* and not actually used?

A. That's right.

Q. Was any part or a portion of the ballast that was loaded into cars rejected; that is, any part of the 58,434 cubic yards rejected by the Corps of Engineers?

A. No.

Q. Now, do you know from your experience—well, first perhaps I should ask you how long have you been in the ballast and crushing of rock or gravel business?

A. Approximately 20 years.

Q. And you have been engaged actively in that business during that time, Mr. Curtis?

A. Yes.

Q. From your experience and from your background in the business that you have referred to do you feel that you are able to state an opinion with reference to the usual practice in the trade with reference to the matter of performance of a [64] contract for an uncertain amount of gravel to be furnished or ballast to be furnished by a fixed date?

Mr. Haessler: I would like to interject before he answers. You are asking with regards to a customary contract and not with regard to this particular contract; is that correct?

Mr. Ramacciotti: Contracts of this type that have to do with a fixed date.

Mr. Haessler: You are not asking for a proposal of the law of this witness?

(Testimony of Marland G. Curtis.)

Mr. Ramacciotti: I am asking him for an opinion as to the custom in the trade, not as to this contract, particularly.

The Witness: Our experience has been, and I think I could say it is a custom of the trade, when you have a contract to produce material and stock-pile it on a certain date prior to its use you have to know the quantity that you are going to produce or you can't produce it. And all of the other contracts we have had similar to this, the prime contractor always advises us of the amount of the material that we are to produce and then if it is more or less than the requirements, the requirements of the contract are changed later, then he obtains the additional material elsewhere; or if he has got an excess, why, he does whatever he pleases with that.

But we have always got the quantity that they require, and then when we finish we get paid for it.

Q. Now, Mr. Curtis, the contract in evidence sets forth the date for the completion of the stock-piling of ballast as the 11th of October, 1951. Were you completed with your stock-piling by that date?

A. No, we weren't.

Q. Do you remember when your stock-piling was completed? A. December 22nd.

Q. 1951? A. 1951.

Q. Will you state the reason, if any, for your not having completed this stock-piling by the date fixed?

A. Because the progress of the work where the

(Testimony of Marland G. Curtis.)

ballast had to be used was being delayed and there was no necessity of having the ballast stock-piled by that date.

Q. Now, if you were going to meet the date, would that have required one or more shifts on your crushing equipment?

A. We would have had to work two shifts then.

Q. So that as it was how many shifts did you use?

A. We worked two shifts for a while, and then we changed to one shift when we could see that there was no urgency for having the material stock-piled.

Q. Now, the stock pile was completed to the extent of these 58,000-plus cubic yards, you say, in December? A. Yes.

Q. And I think you say that it was not until April that any [66] portion was removed for application to the track? A. That's correct.

Q. Did you agree to this delay? A. No.

Q. Or accede to it? A. No.

Q. Do you know whether or not the defendants or any of their representatives that have been referred to here; that is, either Mr. Huncke or Mr. Moore or Mr. Salm, agreed to your slowing up and delaying in the production of the ballast in the stock pile?

A. Yes. It was discussed with Mr. Salm, and he agreed that there wasn't any urgency for meeting the October 11th deadline.

(Testimony of Marland G. Curtis.)

Mr. Haessler: May I have that answer read back, please?

(Whereupon the witness' last answer was read by the Court Reporter.)

Q. (By Mr. Ramacciotti): The Contentions of Fact of the plaintiff here make reference to the matter of some 9,000 additional cubic yards of ballast material that were used on this job by the defendants and that were not—the use of same was not made known to you; that is, over and above the amount that was originally contemplated. Were you informed before you dismantled your ballast equipment of any additional requirements other than as set forth in the prime contract? A. No. [67]

Q. Or the subcontract? A. No.

Q. Were you ever furnished with any supplemental contract changing the requirements of the Corps of Engineers in so far as ballast was concerned? A. No.

Q. Were you ever furnished with any change orders—— A. No.

Q. ——issued from the office of the Corps of Engineers with reference to ballast requirements? A. No.

Q. The contentions or facts of the plaintiff make reference to the fact that the Corps of Engineers by one change order allocated and paid or tendered to the defendant some \$1845 in connection with additional ballast.

Mr. Haessler: Whose contentions are those?

Mr. Ramacciotti: That is our No. 9.

(Testimony of Marland G. Curtis.)

Q. Were you informed of the payment of that amount— A. No, I wasn't.

Q. —to the defendants or the tendering of that amount in connection with ballast that was used on this job after the completion date of the contract? A. No.

Q. Now, let us get back to the matter of the custom of the trade, Mr. Curtis, with regard to the moving of cars for loading. [68]

* * * * *

Q. Now, there has been something said about the matter of your dismantling your crushing equipment, Mr. Curtis. And, in that connection, do you know whether or not—or did you personally,—let me put it that way,—notify the defendants that you were going to dismantle it prior to the dismantling? A. Yes, we did.

Q. Did they at the time of your giving them notice register objections to your so doing?

A. No.

Q. Now, do you know, Mr. Curtis, whether or not the defendant did any ballast work on the track prior to the time that the gravel pile or gravel stock pile was first packed for the operation?

A. Not to my knowledge.

Q. Was there any other gravel used or any other ballast used on the job save that furnished by you and that procured afterwards, to your knowledge?

A. Do you mean on the total contract?

Q. That's right.

A. They purchased ballast from other sources

(Testimony of Marland G. Curtis.)

for one section of the contract, Section A, which was across the river from where we worked. But we didn't have anything to do with that.

Q. In connection with the 16 miles of the track that we are concerned with, so far as you know there was none purchased other than from you under the contract that is in evidence here and from Springfield Sand and Gravel at a later date?

A. That is right.

Q. Do you know whether or not there was any track of the S. P. on this relocated line made available for ballast and for laying prior to this 2nd of April when the first ballast was removed from your stock pile?

A. Yes, I think there was approximately four miles of roadbed that was ready for track some time before that.

Q. Do you remember how far back prior to that time this four miles was made available?

A. No, I don't. But, as near as I can remember, there was, I believe, two miles ready before we completed our ballast stock pile.

Q. Then two more miles approximately?

A. Then two more miles were——

Q. Now, what is the fact as to whether in your opinion a [71] determination as to requirements could have been had if the defendant had ballasted this track that was available, this distance of some four miles that was available, to determine the requirements, that is, subsistence-wise, and so forth?

(Testimony of Marland G. Curtis.)

A. I think that that four miles could have been ballasted before.

Mr. Haessler: I would like to object to that, sir. He has stated previously that he had no previous knowledge of this type of work, that he is ignorant of it, that he doesn't know anything about the circumstances of railroad laying. And now he has been asked for what certainly calls for expert testimony on the question of knowledge of whether railroad ballast can be properly laid or not.

The Court: I think I will sustain the objection to it. You may proceed by way of offer of proof.

Mr. Ramacciotti: We will pass the matter. I think we will have some other testimony, if your Honor please.

The Court: Very well.

Q. (By Mr. Ramacciotti): In the course of these discussions and in connection with the letters that were written did the defendants ever advise you as to a definite quantity—

A. No.

Q. —other than as set forth in the original contract?

A. No.

Q. Mr. Curtis, it's my understanding that you met with [72] Mr. Huncke before the actual execution of the subcontract here in evidence.

A. Yes, we had.

Q. For discussions. And I understand that you had one meeting with him at a hotel in Pasco, is that correct?

A. That's correct.

Q. Now, at that time and at that meeting what was discussed with reference to the requirements

(Testimony of Marland G. Curtis.)

of the ballast and the matter of giving notice as to the requirements of the——

Mr. Haessler: If your Honor please, before the question is answered could he specify the time that the meeting was held?

Mr. Ramacciotti: I will endeavor to.

Q. Do you recall about when that meeting in Pasco was had?

A. It was about April 1st, 1951, but I wouldn't be sure of the exact date.

Q. Now, tell us what, if anything, was said by Mr. Huncke with reference to the ballast requirements. Was that discussed?

A. Yes, it was discussed.

Q. And do you recall what was said?

A. At that time Mr. Huncke assured us that he would advise us of the final quantities so that we could have them stockpiled on time.

Q. Was anything said at that time at that meeting with regard to the matter of the moving of the cars? [73]

A. No. [74]

* * * * *

Cross Examination

Q. (By Mr. Haessler): Mr. Curtis, you have testified you were ignorant of the procedures of the work being done here. Had you ever furnished ballast for railroad contractors or for railroad work before this job? [76]

A. We had two ballast contracts before this job. One was for the Milwaukee Road and one was for the Corps of Engineers. However, both contracts

(Testimony of Marland G. Curtis.)

were for the material in the stock pile. So we never had any connection with the placing of the ballast.

Q. Did your contract require you to place ballast here? A. No.

Q. Well, then, how was this contract different from the two contracts you had before?

A. It didn't materially differ.

Q. In other words, then, you had two contracts before which were just like this one?

A. Basically, yes.

Q. Didn't you feel your experience in those contracts gave you some knowledge as to what you might expect on this one?

A. In what regard?

Q. Well, you have testified you were ignorant of the circumstances, the situations of this job; that you had no way of evaluating what the requirements were because you didn't know anything about it.

A. That's correct.

Q. But now you tell me you have produced ballast for similar jobs before?

A. That is correct. [77]

Q. Didn't you get any education or any experience on the previous jobs which might enable you to evaluate your obligations under this contract?

A. Yes. We learned—or we knew before we took the contract that in order to stock-pile a given amount of material you have to know the quantity.

Q. All right. Now, let me ask you about the contract. You have testified there were some con-

(Testimony of Marland G. Curtis.)

versations which took place in late March, early April, concerning the contracts; is that right?

A. That's correct.

Q. When did you sign the subcontract?

Let me have Exhibit 2, if you would, please.

Mr. Ratcliffe: Right here it is.

Mr. Haessler: I think that's probably the best evidence, and I will show it to the witness.

Q. I hand you Exhibit 2. Would you advise the Court of the date of execution? I think you might read the first sentence of the contract, if you would, please. This is the agreement which has been stipulated between the parties as being the subcontract which is in issue in this case.

A. The subcontract agreement is dated June 10th.

Q. All right. Now, did you sign this on June 10th? A. I am not sure.

Q. Well, did you sign it on or about June 10th?

A. I signed it probably somewhere—sometime in June, I'd say.

Q. You signed it sometime in June?

A. I could check the record and tell—

Q. Now,—

A. —the letters of transmittal when I signed it.

Q. But it was sometime in June. Conversations, however, commenced at sometime late in March or not—definitely not later than the 1st of April concerning this contract, is that right?

A. That's correct.

(Testimony of Marland G. Curtis.)

Q. Would you tell the Court in your own words what took place? In other words, you talked and then was a draft sent out, and did you send it back, or what were the steps that took place in the formation of this contract?

A. There were several conversations which I don't recall the dates or just exactly what was said. But the last meeting that we had on it——

Q. When was this last meeting?

A. That was around the 1st of April.

Q. All right.

A. We discussed the contract and the terms of it.

Q. Did you have a written draft of the contract before you at that time? A. No. [79]

Q. There was nothing in writing; this was just talk?

A. That's correct. First written draft we had was, I believe, May 12th. But I wouldn't be sure about that without checking my records.

Q. That's the first written draft you had?

A. Yes.

Q. Who prepared that draft?

A. Mr. Huncke.

Q. What did you do with that draft? Did you propose changes in it?

A. We proposed changes. That wasn't written in accordance with the verbal agreements that we had and it was returned to the company.

Q. Were changes made in it? A. Yes.

Q. Changes were made in it? A. Yes.

(Testimony of Marland G. Curtis.)

Q. Now, prior to these conversations did you submit a proposal to the defendant; that is, to Lookout Point Constructors for furnishing the gravel on this job? A. That's correct.

Q. About what time did you submit that proposal?

A. It was sometime, I believe, the first part of March.

Q. First part of March? A. Yes. [80]

Q. Was that proposal submitted in writing?

A. Yes, it was.

Q. How did you go about preparing for the submission of that proposal? Let me ask you this first: How did you hear that they had the prime contract for the job? How did you learn that?

A. I don't remember.

Q. All right. A. That's a long time ago.

Q. Well, that's perfectly all right. How did you go about getting sufficient information to submit a proposal on the job? How did you learn what the job consisted of, in other words?

A. By conversations with Mr. Huncke and copies of the specifications.

Q. You had copies of the specifications of the contract, then, before you submitted your proposal?

A. Of the detailed specifications of the ballast.

Q. All right.

A. Not of the entire contract.

Q. Where did you get those copies of the specifications? Who sent you or who gave you the copies of the specifications?

(Testimony of Marland G. Curtis.)

A. As near as I can remember, it was Mr. Huncke.

Q. In other words, did Mr. Huncke approach you in the first instance, or did you write him asking about the job? [81]

A. I believe that he approached me.

Q. That's your understanding; he approached you? Then you looked over the specifications and studied them, or did you study the specifications before you submitted your proposal?

A. Yes; on the ballast itself.

Q. And then did you also look over the site before submitting your proposal? A. Yes.

Q. You did? How much time did you spend looking over the site?

A. Oh, as near as I can remember, probably three or four hours.

Q. At the time you looked it over were you satisfied that you had done a sufficiently careful job to be informed as to the conditions at the site?

A. Yes.

Q. Then, so that I may be sure I have the sequence right, you had the specifications for the job, you went down and looked over the site, then you came back and submitted a proposal?

A. That's correct.

Q. In response to that proposal there were conversations which took place between you and Mr. Huncke on or about April 1st and, perhaps, at other times; is that correct?

(Testimony of Marland G. Curtis.)

A. There is one thing in there I'd like to explain. [82]

Q. All right.

A. In preparing our proposal we had the specifications on the ballast. We submitted a proposal based on the stock-piling of the 56,000 yards of ballast by a given date.

Q. All right.

A. We didn't have copies of the rest of the contract, or we didn't know what the completion date on the entire contract, what anything else involved. We proposed to furnish 56,000 yards of ballast at a given price by a certain date.

Q. That was your proposal?

A. That's right.

Mr. Haessler: Now, may I have Exhibit 1, if you please, the contract and the specifications?

Q. Now, Mr. Curtis, I hand you Exhibit 1, consisting of the contract and specifications embodied therein. Now, just what document did you have, the specifications and not the contract or just what documents did you have or what documents were furnished to you?

A. Could I check our files on that?

Q. Is it here? A. Yes.

Q. Certainly.

A. Have you got that? The original P & R?

Mr. Ramacciotti: Copy, original, what?

The Witness: Our original proposal. [83]

Mr. Ramacciotti: That is the letter?

The Witness: Yes.

(Testimony of Marland G. Curtis.)

Q. (By Mr. Haessler): These are the pages you had?

A. These two.

Q. These two. Marked specifications for crushed rock ballast?

A. And here——

Q. Well, now, in other words, all you had were those specifications for crushed rock ballast at the time you submitted your proposal?

A. That is correct.

Q. What did your proposal embody? Did it embody any work other than the ballast?

A. Yes, it did.

Q. What other work did it embody?

A. Slide removal and roadbed topping.

Q. Well, you mean, then, you made a proposal with regard to slide removal without having any information or the specifications on that?

A. We——

Q. You testified the only information you had were these pages relating to ballast.

A. That's pertaining to the ballast. We also had sheets as I showed you in there pertaining to slides.

Q. What about roadbed topping? Did you also have sheets pertaining to that? [84]

A. I don't remember that we did have, but if we did they are in there.

Q. Would it be your practice to submit a proposal for roadbed topping without knowing what the work involved?

A. We submitted the proposal. On the things we didn't know about the work we took Mr. Huncke's word for it.

(Testimony of Marland G. Curtis.)

Q. In other words, you submitted a written proposal to Mr. Huncke concerning roadbed topping without knowing what it entailed?

A. No, we knew what it entailed.

Q. How did you know what it entailed?

A. We visited the site and we talked to the Army Engineers.

Q. You talked to the Army Engineers?

A. Yes.

Q. Where did you talk to the Army Engineers?

A. At Lookout Point.

Q. Down at Lookout Point? A. Yes.

Q. Did the Army—did you see the specifications for the roadbed topping?

A. I believe that there is a grade issue specification in there with the ballast on the roadbed topping.

Q. Then you saw the specifications covering everything that went into your proposal? [85]

A. The detail specifications, yes. I mean, the sift analysis, should we say, of the rock, the quality of the rock.

Q. Well, then, by specifications I mean the specifications which are embodied in the contract. Did you see those specifications, specifications which were embodied in the prime contract between the United States Government and—

A. I saw parts of them but not the specifications in its entirety.

Q. Now, to get back to the conditions of the contract, after the conversations this draft was sent

(Testimony of Marland G. Curtis.)

to you and you made changes in it, or you submitted changes and it went back to Kansas City and those changes were made. Then what happened? Then did they send a revised draft back to you? A. Yes.

Q. Then what happened after that?

A. Then there were some things that weren't in the contract that had been discussed which were substantiated at a later date by letter.

Q. Do you have the letter? A. Yes.

Q. Now, let me ask you, these were changes before the signing of the contract?

A. Afterwards. Well, they were things that were discussed before the contract was written. [86]

Q. I see.

A. But by the time we finally got the contract from Kansas City we had considerable amount of the work done and we didn't feel that we should upgrade throughout the entire contract without a contract. So we took it as it was.

Q. However, the contract that you finally got back from Kansas City embodied changes in it which you had previously requested, isn't that correct? A. Yes.

Q. So you have testified. Did you see a copy of the prime contract including the specifications before you signed the subcontract?

A. I probably did, yes.

Q. You say you probably did.

A. I don't remember the exact time, but by the time we signed the subcontract we were well into

(Testimony of Marland G. Curtis.)

the work and I had to see the specifications before that time.

Q. The contract which you signed, the subcontract, contains this provision: "All provisions of the general contract and the specifications and the working drawings are included as a part of this subcontract the same as though written in full herein." I will let you see the clause. That's the final clause. That would be immediately before place of signature.

Would you have signed a subcontract including the terms of the general contract and specifications without [87] knowing what the terms of the general contract and the specifications were?

A. At the time that I signed the contract I was familiar with the general contract.

Q. All right. You were familiar, then, in early June, but you were not familiar in March when you made your proposal; is that correct?

A. That's correct.

Q. Well, when did you become familiar with the terms of the contract? A. That I am not sure.

Q. You are not sure, but it's sometime between the time you made your proposal and the time you signed the contract you became familiar with the terms of the general contract?

A. That's correct.

Q. So at the time you signed this subcontract agreement you were familiar with the terms of the general contract and the specifications?

A. Yes.

(Testimony of Marland G. Curtis.)

Q. All right. Now, at the time you signed the subcontract were you also familiar with all the requirements of the job which you were to do? In other words, were you familiar with the site? You testified you were ignorant earlier of the job to be performed.

A. I said that I was ignorant of the placing of the ballast. [88]

Q. In other words, you were ignorant of how to place ballast, but you were not ignorant of the other requirements of the job? You were not ignorant of the nature of the work being performed there? At least, you were not ignorant as to what you were supposed to do; is that correct?

A. That's correct.

Q. You have had twenty-odd years of experience in furnishing gravel or more, is that right? You have testified to a broad experience.

A. That's right.

Q. You are familiar, then, that one of the hazards in the construction job is that unanticipated problems or difficulties may arise during the course of it?

A. That's correct.

Q. So, when you signed this you realized that there might be unanticipated difficulties or problems on the part of any person who performed?

A. Yes.

Q. And I presume one reason you went to the site and familiarized yourself with it was so that you could anticipate those difficulties or evaluate what you might face; is that correct?

(Testimony of Marland G. Curtis.)

A. Why, you can't anticipate those difficulties by looking at the site.

Q. Well, why did you go to the site then? [89]

A. To investigate the conditions that you knew that existed.

Q. In other words, you investigated the conditions at the site? A. Yes.

Q. Did you take those conditions into account when you submitted your proposal or when you signed the subcontract? A. Yes.

Q. So that the rate at which you agreed to perform the agreed work in determining those rates you drew on the knowledge you had obtained from investigating the site? A. Partially, yes.

Q. Partially. Thank you. All right. Now, going over here as to quantity you have testified that the contract called for 56,000 yards of gravel; is that your interpretation of the contract you signed?

A. Yes.

Q. Why, if it called for 56,000 yards of gravel, did you make 58,400?

A. Because there are two methods of measurement involved. 56,000 is based on car measurement. Our quantity that we had produced was based on cross-section measurements which could vary considerably from the car measurement.

So, in order to be safe, we stock-piled additional material to be sure that we had 56,000 yards of car measurement. [90]

Q. In other words, the only reason you produced any gravel in excess of 56,000 yards was be-

(Testimony of Marland G. Curtis.)

cause due to the difference between car measurement and measurement on the ground you might not have the total 56,000 based on your stock pile unless you allowed some overage for an allowance, is that correct? A. That's correct.

Q. Now, going back to the question of quantity, I'd like to invite your attention to a provision in the subcontract I'd like you to read aloud, if you please. And this is the contract you signed. Starting here, will you read this sentence down to where it says—well, read that. Start reading that paragraph aloud to the Court, please. Just start right here where it says—

A. "Estimated quantity 56,000 cubic yards. The quantities listed above are estimated only. The subcontractor will be required to complete the work specified above in accordance with this contract and at the price or prices, whether it involves quantities of greater than or less than the above shown estimates."

Q. Thank you. Now, let me—were you familiar with that clause of the contract when you signed the contract? A. Yes.

Q. What did you understand that clause to mean? In other words, what does that clause mean to you? [91]

A. That clause means that at any time prior to the completion of our stock-piling of the ballast the contractor could change the quantities if he wanted us to produce more or less than the 56,000 as long as he advised us prior to the time that we

(Testimony of Marland G. Curtis.)

had to have the ballast stock-piled. We would have made more or less than the 56,000.

Q. In other words, does the contract say anything about the contractor informing you as to the quantities required?

A. The contract doesn't, but it was agreed prior to the signing of the contract and was substantiated in a letter from Mr. Huncke subsequently that he would advise us of the quantities he wanted to stock-pile.

Q. You say it was agreed. However, under this clause it was your obligation to furnish all of the gravel required for the job; is that the way you understood this clause?

A. Yes; as long as we were advised of the quantity.

Q. You are reading in the phrase "as long as." It does not appear in the contract?

A. Well, you——

Q. Would you show me any place in this contract where it sets forth a provision that you are to be informed as to the precise quantity of gravel required?

A. No, it isn't in the contract.

Q. Isn't in the contract. Doesn't this contract do just the opposite? Doesn't it put you on specific notice that you [92] may have to furnish more or less gravel than 56,000? Doesn't it say that that's only an estimate?

A. That's correct.

Q. Did you take a theoretical estimate of the

(Testimony of Marland G. Curtis.)

gravel that would be required for this job? Did you make one? A. No.

Mr. Ramacciotti: Objected to as immaterial.

The Court: What do you claim for it?

Mr. Haessler: I believe the transcript will show, but I can't show it with precision, that he previously testified that he had determined theoretically what the requirements of the job were. However, I will withdraw the question. I don't recall the reference.

Q. Were you familiar with that portion of the general contract; that is, the prime contract between — entitled "Estimated Quantities, Section SC-3"—which states that the quantities are estimates only and that the contractor will be required to furnish all the gravel for the job, irrespective of whether it is more or less than the estimated sum? A. Yes.

Q. You were familiar with that? A. Yes.

Q. Then you understood that it was your obligation to furnish all the gravel required for the job and not merely 56,000 yards. But you qualify that by an alleged conversation [93] with Mr. Huncke in which he said that he would help you or he would let you know how much more you might have to furnish; is that your understanding of the agreement?

A. Not only a conversation but a letter from Mr. Huncke stating that he would advise us of the final quantities within two weeks.

Q. All right. Well, then, if there were not that

(Testimony of Marland G. Curtis.)

letter and that alleged conversation, your obligation would be to furnish all of the gravel required for the job and not merely 56,000 yards; is that correct?

A. Our obligation should be the intent of the parties when they entered into the contract.

Q. The intent—that's a statement of law, but it's also a statement of law that the intent of the parties is manifest by what they see and what they sign. What does this contract—well, we have pursued that line, I think, far enough. [94]

* * * * *

Q. Mr. Curtis, you have testified that you actually had 58,400 yards and not 56,000 yards; is that correct? Were you paid for 58,400 yards?

A. No, we weren't. We were not.

Q. Did you expect to be paid for 58,400 yards?

A. Yes, we did.

Q. In other words, you felt, in other words, that 58,400 yards was part of the contract? [95]

A. Yes.

Q. All that was part of the contract? Now, you have testified that you were never asked to check the quantity that you would have to produce, that you'd be required to produce, until the summer of '52; is that correct? A. That's correct.

Q. You further testified that you were never asked to determine the quantity until after you had dismantled your plant, your gravel-making plant; is that correct?

(Testimony of Marland G. Curtis.)

A. I can't remember the exact dates without checking the record on those things.

Q. Well, when did you dismantle your plant?

A. In February of 1952.

Q. You dismantled the plant in February?

A. February and March.

Q. You have testified that you were not asked to check the quantities till the summer of '52.

A. I can't remember the dates without checking the letters.

Q. Well, I think—I am certain the record will show, Mr. Curtis, that you testified on direct examination that you were never asked to check quantities until the summer of 1952. Do you wish to retract that statement now?

A. We received a letter from Mr. Huncke advising us to determine our own quantities. But I don't remember the date of the letter. [96]

Q. I see. Then you may have received that letter before you dismantled the plant; is that correct?

A. It may have been that early; I wouldn't be sure.

Q. I hand you here by courtesy of the Bailiff Plaintiffs' Exhibit 4-E, being a letter from—no. I beg your pardon. That's Plaintiffs' 4-F, being a letter dated December 3rd, 1951, from Mr. Huncke to you, Mr. Curtis. Would you read the first sentence or the first couple sentences of the second paragraph of that letter, please?

A. "I am sure that by the terms of our agree-

(Testimony of Marland G. Curtis.)

ment, that Curtis Gravel Company is obligated to produce all ballast material required, irrespective of the quantity needed.”

Q. Thank you. What was the date of that letter, please? A. December 3rd, 1951.

Q. When did you dismantle your plant?

A. February and March of 1952.

Q. In other words, you were put on notice, then, well in advance of the dismantling of your plant?

A. We were put on notice what is contained in this letter. We were not notified of the quantity to produce.

Q. You were not notified of the exact quantity?

A. No.

Q. But you were notified—at least in our extent, the defendants’ understanding of the contract, you were obligated [97] to produce all the ballast required for the job?

A. We were notified of that, yes.

The Court: What is the exhibit number?

The Witness: 4-F.

The Court: Thank you.

Q. (By Mr. Haessler): Did you reply to that letter, Mr. Curtis?

A. I am not sure without checking the records.

Q. You don’t have any recollection of having sent a written reply to that letter?

A. No, I don’t.

Q. Do you have any recollection of having made any reply to that letter?

A. Not specifically, no.

(Testimony of Marland G. Curtis.)

Q. Now, it was your contention that there was an alleged oral conversation between you and Mr. Huncke that he would notify you of the precise amount of ballast required for the job; is that correct?

A. There was an oral understanding before we signed the contract, and it was verified in writing prior to the writing of this letter.

Mr. Haessler: All right. If the Court please, may I have the letter, please?

Q. In this letter to which you made no reply, being Plaintiffs'—pardon me; Defendants' 4-F, Mr. Huncke makes the further suggestion saying, "I am sorry that we are unable [98] to give you any more definite or accurate information. It is our suggestion that you take off the quantities from the plans and base your production of material on the quantity which you believe will be required."

Now, did you do that?

A. No; because we had no experience in that kind of work and there was no way that we could take off the quantity. [99]

* * * * *

Q. Why didn't you send a reply to this letter advising Mr. Huncke that it would be his obligation under your understanding of the contract to furnish you with the quantities involved?

A. Well, because we had advised him prior to that on, I think, more than one occasion that it was his obligation which he agreed that he would furnish up the quantities and couldn't see where it

(Testimony of Marland G. Curtis.)

would do any good to keep repeating myself.

Q. You had advised him that it was his obligation under the terms of the contract?

A. That it was his obligation to furnish us the——

Q. That it was his obligation?

A. To give us the quantity that he wanted us to stock-pile.

Q. Well, in any event, you made no reply to this letter of Mr. Huncke's informing you you were required to produce all the ballast material required for the job and also directing you to make such take-offs as were necessary? [100]

* * * * *

The Witness: To the best of my knowledge the letter was not answered. [101]

* * * * *

J. G. SHOTWELL

produced as a witness on behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ratcliffe): Now, Mr. Shotwell, would you state your occupation?

A. I am what would be termed as an aggregate producer.

Q. Aggregate producer. And for whom are you employed? A. Well, I am self-employed.

Q. Self-employed. An aggregate producer, will you explain just what that means, aggregate producer?

(Testimony of J. G. Shotwell.)

A. Well, it's the mining of concrete aggregates, or, probably, ballast, that would be supplied to general contractors. It's a subcontracting business, you might say.

Q. Now, what is the name of your business?

A. Just J. G. Shotwell.

Q. How long have you been engaged in this business?

A. Since in the early '30's. Twenty-five years.

Q. I see. And in your experience as an aggregate producer—excuse me just a moment. In your business are you acquainted with contracts specifying needs; that is, producing all the concrete aggregates or other material required for a particular job? I mean, that is a common provision in construction contracts; is it not?

A. Yes, sir. [133]

Q. In your experience can you state whether or not where a contract provides that an estimated quantity of your product is to be produced by a designated date in stock pile—are you familiar with that type of contract?

A. Well, practically most supply contracts are more or less the same.

Q. In that type of contract is it the obligation of the buyer of the material, or of the seller,—that is, the producer of the material,—to finally determine the quantity that will be stock-piled?

A. Well, the producer would have no way to know. He'd have to get his information from the buyer, naturally.

(Testimony of J. G. Shotwell.)

Q. So, it's then your answer that it is the obligation of the buyer to furnish that information?

A. Yes, sir.

Q. In the custom of the trade, regular usage of the trade, when is that information furnished?

A. Oh, it would be furnished before the termination date, of course, because it would have to be furnished before the termination date.

Q. In your experience is it normal in these contracts to make these specific provisions in the contract that the buyer will so notify?

A. Well, it would be understood. It might not be in the contract, but it would have to be an understanding that he [134] would notify the producer because the producer has no way to go to the Army Engineers and find out. He is a subcontractor.

Q. Well, then, but is it normally in the contracts? You of your experience in the trade and experience with other parties, your knowledge in the trade, is it normal to set forth in the contract that the buyer will advise you of the amount required? A. Why, certainly.

Q. Is that language normally contained in the contract, written in the contract?

A. Well, it wouldn't have to be written in the contract, but it would be understood.

There would be no discussion about that. That would be just a fact according to the contract that you'd have to be notified.

Q. Well, if such language were omitted from the

(Testimony of J. G. Shotwell.)

contract, specific language omitted from the contract, in the trade it would be read into the contract; is that correct?

A. Oh, certainly. Certainly have to be.

Mr. Ratcliffe: That's all.

Mr. Ramacciotti: Just one second. That's all.

Cross Examination

Q. (By Mr. Haessler): You have testified, in other words, Mr. Shotwell, that [135] it's the obligation of the buyer or of the general contractor to let the man providing the subcontract or providing the aggregate know how much aggregate he is going to need before the contract has ended, before the contract terminated; is that correct?

A. Before the producer was finished.

Q. Yes. In other words, the producer—the buyer has an obligation to let the producer know before the contract is terminated how much aggregate he is going to need; is that what you say?

A. If I understand the question, yes. The purchaser would notify the producer how many tons or how many yards of material was necessary to complete what would be needed.

Q. And when does he have to—and he has to notify him before termination of the contract, is that correct?

A. Before he could finish his contract. If he had a terminating date, he couldn't terminate until he was notified exactly what tonnage he had to produce.

(Testimony of J. G. Shotwell.)

Q. Until he knew that he'd produce all that was required of him?

A. No. Produce the tonnage that would be required.

Q. Well, I think this is very obvious that you can't deliver gravel unless you know how much you are supposed to deliver. Is that the point you are trying to make?

A. Yes, that's the point I'm trying to make. You'd have to know, yes.

Q. All right. Is there any obligation in the custom of the trade for the buyer to notify before the contract is finished or before the buyer himself knows how much he is going to need?

A. Well, I don't understand that question.

Q. Well, you testified that the purchaser has to let the producer know before the termination—before the completion of the contract how much he is going to need because if he doesn't let him know the other man isn't going to know. If the producer doesn't know, he will never know how much to produce, when the contract will be complete. Let me rephrase that once more. You go into the job; it's the custom in the trade as you are producing gravel, it's the custom of the trade before the contract is finished to let you know how much gravel you have to supply, isn't that correct, or you can't supply it? A. Why, certainly.

Q. Now, is that what you are testifying to or are you suggesting something more?

A. No, I am suggesting that you might take a

(Testimony of J. G. Shotwell.)

contract to supply material for a certain building or certain dam but might not know exactly what you are supposed to supply before you start it because sometimes those quantities vary. But before your termination date you'd have to be notified that it was going to take so many tons to finish that job.

Q. Correct.

A. So you'd have to know how many tons to deliver, otherwise you'd have to wait to find out, unless the person that's buying the material from you tells you so and then you'd have to deliver it.

Q. That seems perfectly reasonable to me. In other words, at the time you start out the manufacture you may not know ultimately how much you are going to produce?

A. You'd have an estimated quantity which probably might vary and probably would vary.

Q. Does the amount that you produce generally vary somewhat from the estimated quantity?

A. Oh, I would say so, yes.

Mr. Haessler: I see. We have no further questions.

The Court: Redirect?

Redirect Examination

Q. (By Mr. Ratcliffe): Just to clarify that, Mr. Shotwell, it is your testimony, as I understand it—excuse me. It is the absolute obligation—the absolute obligation—did I stress that—of the purchaser to notify the producer of the quantity prior to

(Testimony of J. G. Shotwell.)

completion date; that is, prior to the time that that facet of the contract is to be completed? [138]

A. Why, certainly.

Mr. Ratcliffe: I think that's all.

Mr. Haessler: We have one further question. Is your Honor going to question?

The Court: No.

Mr. Haessler: We have one further question.

Recross Examination

Q. (By Mr. Haessler): With regard to your experience, Mr. Shotwell, have you produced ballast? A. Railroad ballast?

Q. For railroad jobs.

A. No, I haven't produced railroad ballast; no.

Mr. Haessler: Never. That's all. No further questions.

Mr. Ratcliffe: No further questions. [139]

* * * * *

MARLAND G. CURTIS

thereupon resumed the stand as a witness in behalf of Plaintiffs and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

* * * * *

Q. (By Mr. Haessler): You have testified that you actually produced 58,400 yards of gravel in the stock pile, is that correct?

A. That's correct.

(Testimony of Marland G. Curtis.)

Q. How did you produce that gravel?

A. Well, first you move a plant into—set up the crushing plant, and then you strip the quarry of the dirt.

Q. Pardon me. You what the quarry?

A. I say, you strip the quarry of material that is undesirable, dirt, trees, and then you drill the quarry and blast it and dynamite. [212]

Q. Did you use a coyote shot in blasting?

A. Yes.

Mr. Haessler: For the benefit of the Court, a coyote shot is——

Q. I think perhaps you are the better expert. Would you describe to the Court what a coyote shot is?

Mr. Ramacciotti: I think I'd be inclined to object to that as immaterial, irrelevant, and not proper cross examination.

The Court: Well, it may be interesting, but whether it is material or not is questionable.

Mr. Haessler: Our theory is this, your Honor: That the defendants used a coyote shot; that he estimated what gravel he would require at the time he ran the shot; that at the time he removed his crushing equipment from the ground we were going to ask him—he had used up all the gravel that was there. It would have been an expensive item for him to have done more. That goes to the motive of why he removed his equipment from the place.

The Court: Very well. You may proceed.

Mr. Haessler: Thank you.

(Testimony of Marland G. Curtis.)

Q. Would you tell the Court very briefly the distinction between a coyote shot and an ordinary shot or drill shooting?

A. What kind of drill shooting do you refer to?

Q. Well, please tell the Court what a coyote shot is. [213]

A. That's when you drill a small tunnel probably three or four feet in diameter back under the rock and then load it. Sometimes you tee off a time or two, depending on the shot, and then you put dynamite in and you plug it back up with sand and set it off.

Q. In other words, you shoot in a number of, several places at once; is that correct?

A. No. Usually maybe two.

Q. Maybe two? A. Three sometimes.

Q. Maybe more? How many places did you shoot in in this case?

A. I don't know. I wasn't never back in a coyote hole.

Q. Pardon me?

A. I don't know. I wasn't back in the hole.

Q. You weren't what?

A. I didn't go back in the hole. I don't know how many places we shot.

Q. Why did you use a coyote shot? Is it not a fact that a coyote shot is designed to bring down a fairly definable and substantial quantity of gravel at one time, or rock, so you don't have to keep having a succession of small shots?

A. You shoot——

(Testimony of Marland G. Curtis.)

Q. Please answer Yes or No and then explain.

A. I will answer Yes. [214]

Q. All right. Now you may explain.

A. No. Just skip it.

Q. All right. Yes. Is it not the fact that in using a coyote shot you estimate the amount of rock in advance of setting off the shot and place the holes accordingly? In other words, a coyote shot is designed to bring down a fairly closely estimated amount of rock, is that correct?

A. I would say No.

Q. How many shots did you set off at this rock pile?

A. I'm not sure whether it was one or two.

Q. You are not sure whether it was one or two. Was there any rock left that could have been delivered, or was there any rock left for crushing at the time you removed your crushing plant?

A. I would estimate probably in the neighborhood of 25,000 yards.

Q. There was 25,000 yards left. Was Mr. Thompson present when the drilling was done?

A. Yes.

Q. Or when the shots were set off?

A. Yes.

Q. Does he have more information on this question than you do? A. Yes.

Q. All right. I think we will leave that point. Now, do [215] you know of your own knowledge whether the material that was left in the rock pile, the reported 25,000 tons, was in a condition that it

(Testimony of Marland G. Curtis.)

could—could that material have been used in the crusher, or would it have had to be shot again?

A. Most of it could have been used in the crusher.

Q. Most of it could have been used in the crusher. Do you know that of your own knowledge?

A. I looked at it shortly before we quit crushing, and that's the way it looked to me.

Q. Shortly before you stopped crushing you looked at it? A. Yes.

Q. And in your opinion you could have used it in the crusher? A. Yes.

Q. Without further blasting?

A. Yes. Not all of it. Naturally, you have to do secondary shooting. We had to do secondary shooting throughout the job.

Q. All right. Oh. You testified on direct examination earlier today that the stock-piling would—was completed by December 22nd. You were then asked why you didn't meet the earlier date and you said that there was no necessity of meeting the date. What did you mean by that?

A. There wasn't any roadbed ready for the ballast and none of it had been used yet, so there wasn't any reason to work two shifts just to get it out of there and stock-pile it for next summer.

Q. I see. In other words, it wasn't required by the job by October 11th so that, there being no necessity, you just made a more leisurely—

A. We talked it over with Mr. Salm and he

(Testimony of Marland G. Curtis.)

agreed that it was all right if we went beyond the October 11th date.

Q. So you did so? A. Yes.

Q. Did you file any claim for extra compensation because you continued to produce beyond the October 11th date?

A. No. We did that for our own convenience.

Q. Now, you finished stock-piling by December 22nd. When did you dismantle your plant?

A. February.

Q. In February? A. Yes.

Q. When in February?

A. As near as I can remember, it was shortly after the 15th we started dismantling.

Q. Did you use the plant from December 22nd to February 15th? A. No.

Q. What did you do with the plant after you removed it on February 15th?

A. Most of it was moved into Spokane. Some of it we sold, some of it we moved later to other jobs.

It wasn't a plant that stays together; it was a [217] stick plant as you call them.

Q. How quickly was part of it used on other jobs? A. I couldn't begin to say when.

Q. You don't recollect?

A. I don't. There is no way that I could find out. There is too many parts to it. Maybe one electric motor might have went here today and there tomorrow. [218]

* * * * *

(Testimony of Marland G. Curtis.)

Redirect Examination * * * * *

Q. (By Mr. Ramacciotti): Let me start again on that question. In connection with [220] these other two railroad contracts, Mr. Curtis, did you procure or were you furnished with exact quantities as to the requirements of ballast?

A. Yes, we were before. [221]

* * * * *

Q. What were the terms of those two? Or, take one of those two contracts.

A. Well, the one we had for the Milwaukee Railroad, we were to stock-pile a given amount. I can't recall the amount of ballast. An estimated amount of ballast. And before we finished stock-piling the ballast they would measure the stock pile once a month and then they told us before we completed crushing exactly how many yards they wanted and we produced that much and that was the end of it.

Q. And was that notice as to the exact number of yards that they wanted given you before the date specified as the expiration date for the production of the ballast?

A. Yes. It was given to us before we completed the ballast, which was before the completion date of the contract.

Q. Now, the other one, was that of a same type or was there some difference?

A. The other one was with the Army Engineers and they specified an estimated amount to start with, and before we completed the job they had

(Testimony of Marland G. Curtis.)

given us the exact amount they wanted to stock-pile. [222]

* * * * *

Q. Now, that contract was prepared by the company that was [223] the prime contractor?

A. Yes. It was prepared by Mr. Huncke.

Q. That is true, likewise, of the subcontract in this case? A. Yes.

Q. In your cross examination, Mr. Curtis, you testified that you were not paid for the 58,434 yards of ballast that was produced but you were not asked why or by what computation you figured you were not paid. What is the fact as to how it happens that you were not paid?

A. Well, the money was—part of the money was withheld up from our final estimate on account of extra cost of obtaining ballast.

Q. That is the eleven thousand some-odd hundred dollars included in the first— A. Yes.

Q. Now, before you actually entered into and affixed your signature to the contract of the 10th of June with the defendant you did make an inspection, I think you say, some three or four hours, of the area where this track was to be located?

A. Yes. That was mostly at the quarry site.

Q. Yes. What type of an inspection did you make, Mr. Curtis?

A. We looked at the quarry to see what problem there was in crushing the rock and where we could stock-pile it.

Q. Well, did you at that time or at any time be-

(Testimony of Marland G. Curtis.)

fore entering into this contract start walking along the 16 miles of the [224] relocated line to inspect the texture of the soil or the condition of the ground?

A. No; because there wasn't any reason for it. There wasn't anything to be gained.

Q. You were not laying the track; you were having nothing to do with the placing of the track or its location?

A. Well, at that time most of the track where the track was to go was under construction. The roadbed wasn't completed in most of the way at that time. So we didn't know what it was going to amount up to when they got through.

Q. I think you made mention of the fact that when this contract was being considered your negotiations or discussions about it started along in March and terminated on the 10th of June of 1951. During that interval of time, during that period, there was a contract sent you by the defendants or by Mr. Huncke, I think you said, and it was returned for the reason that it was not in conformity with the discussions that you had had with Mr. Huncke with regard to an agreement.

A. That's right.

Q. And I believe you mentioned three different variations from your verbal understanding that appeared in the first draft prepared by Mr. Huncke of the contract. What were they, please?

A. The date—the completion date for Schedule A was May 1st and it should have been May 15th.

(Testimony of Marland G. Curtis.)

And, then, there were three [225] things that we had discussed that we were concerned about. That was one. Because, we couldn't even get in there by May 1st. And another was the possibility that slides would occur after the rail was laid and we didn't have any equipment that we could operate on the railroad. So I discussed that with Mr. Huncke and he agreed to furnish rail transportation if we had slides that required it at a price that would be equitable. And it was later confirmed by letter sometime later on, several months later, when it looked like it might be that we would have to use cars. The other thing was the quantity of the ballast.

Q. Now, with regard to the matter of the amount of ballast, just what was the discussion? What was said by each of you with reference to the amount of the ballast when you first had the discussion prior to the first draft of the contract?

A. Well, we wanted assurance from Mr. Huncke that he would advise us how many yards to stockpile by October 11th so we wouldn't have to cap the plant as well or be responsible for the quantity of ballast because we had no way of determining how much ballast it was going to take, actually.

Q. Now, the fact that the plant was detained there after that date and until the commencement of dismantling, which you say, I think, was about the middle of February——

A. February.

Q. ——resulted in cost or expense to Curtis Gravel Company? [226]

(Testimony of Marland G. Curtis.)

A. Yes, it did. But we felt that we were obligated to keep the plant there until February 15th and we were trying to get information from Mr. Huncke as to what quantity of ballast we were to produce, if he wanted any more, or just what to do about it.

Q. Do you remember about when it was that you started work on this job; that is, starting in to move in equipment and actively engaging in parts of your job?

A. It was about the 1st of May when we started moving equipment in.

Q. At that time you had no written contract at all?

A. We didn't receive final signed copies of the written contract until, I believe it was, sometime in August.

Q. In other words, you had no signature of the defendants, or either of them, on any formal agreement until August of 19——

A. I believe it was August.

Q. And you performed in accordance with your verbal understanding, I believe, until that time?

A. Yes.

Q. Now, how much of your time was spent at the job site through the period from May until February of the next year? Were you there just periodically or did you spend time there for a day, and——

A. I was there periodically. I would say, probably, two [227] or three days at a time, maybe once every ten days or two weeks.

(Testimony of Marland G. Curtis.)

Q. I believe you testified that you had some conversations as indicated on cross examination about the matter of how much ballast. Did you ever talk with Mr. Huncke out on the site regarding that matter? A. Not that I can recall.

Q. Did you ever talk with Mr. Salm about it?

A. I talked with Mr. Salm, yes.

Q. Would you tell us about how many times you spoke with him and made requests?

A. Oh, as near as I can remember, about three times that it was discussed. [228]

* * * * *

Recross Examination

Q. (By Mr. Haessler): You testified with regard to the St. Paul Railroad contract and the other contract that you performed which had estimated quantities. You said it was the practice in those contracts for you to be furnished from month to month as you went along until completion the amounts that were going to be required; is that correct?

A. No, that is not correct. We were furnished month to month with the quantity that had been produced. [235]

Q. You were furnished month to month. What do you mean by had been produced? You were told how much you would produce each month?

A. Yes.

Q. You didn't know that of your own accord?

A. Well, no. They do the measuring in those contracts.

(Testimony of Marland G. Curtis.)

Q. Oh. But in each of those contracts were you informed at the beginning of the construction how much the estimated quantity in fact would be? In other words, if it said estimated 50,000 were you told it would not be 50,000 but actually would be 51,000?

A. Not at the beginning of the contract, no.

Q. Well, in other words, over the life of the job, I think is the phrase you used.

A. We were advised before we completed crushing the exact yardage that would be required.

Q. What determined the date on which you completed crushing?

A. Well, if we had a contract that was to be completed in a hundred days and it had 50,000 yards in it and in 50 days we had 45,000 yards, then we would assume that we would be done in four or five days from then and they would tell us they wanted some more crushed rock.

Q. Now, those were contract with railroads. What were they for, for the supply of ballast material?

A. Yes. [236]

Q. Your obligations under the present contract went much farther than just supplying ballast material, didn't they? In other words, you had to be concerned with the grade because your obligation, you had to clear the right-of-way, prepare the roadbed, and do other things besides just supply gravel; is that correct?

A. We had to do some work on the roadbed, yes.

Q. So this, in other words, was a construction

(Testimony of Marland G. Curtis.)

contract rather than just a gravel supply contract; is that correct? A. That is correct, yes.

Q. All right. One or two more quick questions. Why did you feel you were obligated to keep your crushing plant on the site until beyond October 11th, 1952? You testified, in other words, that you felt obligated to keep it until February 15th. Why did you feel obligated to keep it past October 11th?

A. Because February 15th was the original completion date of our subcontract.

Q. There is nothing in the subcontract that refers to February 15th, is there?

A. Through reference to the main contract, yes.

Q. The completion date, that's what I mean. The completion date referred to you in your subcontract is October 11th, is that right?

A. On part of the work, yes. [237]

Q. All right. Now, one last item and we will be finished. Counsel asked you, followed up our question, of whether you had been paid for 58,600 and you have testified you hadn't and related it to the computations in your claim. Did you bill—did you figure your charge in this case or your claim on the basis of 58,600 yards of gravel or on the basis of 56,000?

A. Fifty-eight thousand-something.

Q. Six hundred. So you felt that that additional quantity was a part of the contract even though the contract had estimated quantity 56,000?

A. Yes. [238]

* * * * *

DAVID E. THOMPSON

produced as a witness on behalf of Plaintiffs, being first duly sworn by the Judge, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ratcliffe): Mr. Thompson, will you state your name? A. David E. Thompson.

Q. What is your occupation, Mr. Thompson?

A. I am a construction engineer.

Q. Where?

A. I am employed presently by Pacific Construction of Honolulu.

Q. During the period of the construction of the relocated Southern Pacific line down near Lowell, by whom were you employed?

A. By the Curtis Gravel Company.

Q. In what capacity? [239]

A. As Project Superintendent.

Q. What project was that?

A. That was the project as accomplished by Lookout Point Constructors wherein our work was a subcontract to that organization.

Q. During the period of employment there were you at the site? A. Yes, I was.

Q. As Project Foreman?

A. As Project Superintendent.

Q. Project Superintendent. Mr. Thompson, have you met Mr. Huncke and Mr. Salm who have been referred to in the testimony here?

A. Yes, I have.

Q. Will you tell us when and where you first met Mr. Huncke?

(Testimony of David E. Thompson.)

A. To the best of my recollection my first meeting with Mr. Huncke was in a hotel in Pasco where I accompanied Mr. Curtis. It was a meeting in Mr. Huncke's room one morning.

Q. Do you recall approximately when that was?

A. I believe it was in late March or early April.

Q. Will you tell the Court what matters were discussed at that meeting?

A. The purpose of the meeting was to discuss a proposed subcontract of the Curtis Gravel Company to Lookout Point Constructors. [240]

Q. In conjunction with the work at Lowell?

A. That is right.

Q. What matters were discussed in conjunction with this proposed subcontract?

A. The points that come to my recollection were some features of this proposed subcontract that we were concerned with. We knew that we were to be—going to be asked to sign a subcontract which bound us to certain portions of a general contract.

One of the problems that arose was the removal of slide material where railroad track had been installed. Our equipment was such that we had no way of operating on rail and no way of hauling that material. So we had discussed with Mr. Huncke the problem of dividing that work in such a manner that we would load and the general contractor would provide the hauling, disposing of the equipment.

The other item was the fact that we were—if we were to proceed with this contract we were to be

(Testimony of David E. Thompson.)

asked to meet a construction date which would be virtually impossible on one portion of the work. A completion date, I should say.

Q. What portion of the work was that?

A. That was the portion of the work known as Section A, or Part A of this subcontract of ours.

Q. For the sake of the record, what does Part A have to do with? [241]

A. It was the work on the north side of the river in conjunction with the railroad grade.

Q. What other matters were discussed?

A. The one other matter that I recall being mentioned was the request on our part for a determination of the final quantity of ballast to be made and a consent on Mr. Huncke's part that he would provide us with that information.

Q. Now, that was, you say, the consent of Mr. Huncke that he would provide. Can you spell that out in a little more detail? A. I——

Mr. Haessler: Before he spells it out, would you specify the time?

Mr. Ratcliffe: I thought we had done that.

Mr. Haessler: Would you tell me the time?

The Witness: To the best of my recollection it was in late March or early April.

Mr. Ratcliffe: It's a little difficult to hear you, Mr. Thompson. Would you speak a little louder?

Q. You were giving testimony regarding the request on the part of Curtis Gravel to furnish definite amounts of ballast material which would be required prior to completion date, is that correct?

(Testimony of David E. Thompson.)

A. To furnish us with a firm quantity of material prior to the completion date. [242]

Q. And Mr. Huncke's response to that request?

A. He indicated that he would provide us with that information prior to the completion of our work.

Q. Now, you used the term "indicated."

A. He stated or said or told us that he would give us that information later.

Q. Did he indicate at what time he would give you that information?

A. I recall no specific time mentioned except the point of discussion was that we would need it before we finished the stock-piling of the ballast.

Q. And at that time were you discussing the time the ballast was to be stock-piled; that is, the completion date for the stock-piling of the ballast?

A. The completion date for the stock-piling of the ballast was specific in the subcontract. The work was to be completed on or before October 11th.

Q. At that time that date of October 11th had been firmly established, is that correct? The subcontract agreement itself was not then in existence; that is, written out?

A. That's true. I don't recall whether the date had been established at that date or not.

Q. But in that conversation the matter of a completion date was discussed?

A. We were asking for a firm quantity prior to

(Testimony of David E. Thompson.)

the completion [243] date of the stock-piling of the ballast.

Q. After that time did you have any further conversations with representatives of Lookout Point Constructors regarding the matter of a firm quantity of ballast prior to the date you were to complete stock-piling?

A. I had one other casual or accidental meeting with Mr. Huncke which occurred at the service at Dexter one afternoon. Mr. Huncke and Mr. Salm were present when I met them.

Q. Do you recall approximately when that was?

A. I don't recall the date, but I believe it was before or close to the time that we began writing letters asking for a specific quantity. Our first letter, I believe, was of September 14th.

Q. To the best of your knowledge it would have been sometime in early September, is that correct?

A. To the best of my knowledge. I don't recall the date. I recall the meeting and the place and the parties. And again the matter of a firm quantity of ballast was brought up. Mr. Huncke was asked if and when he would provide it, and I was told that he would provide it at a later date.

Q. Mr. Salm, did he partake in that conversation? A. Mr. Salm was with Mr. Huncke.

Q. Actually at that time did Mr. Salm say anything?

A. Yes. It was a three-way conversation.

Q. But, I mean, which was it, Mr. Huncke or Mr. Salm, or both [244] of them, that gave you

(Testimony of David E. Thompson.)

the assurance that a definite quantity would be furnished?

A. I asked Mr. Huncke and Mr. Salm and I had had previous conversation regarding this point.

Q. Who gave the answer to your question?

A. Mr. Huncke gave me the specific answer.

Q. Now you mentioned having previous conversations with Mr. Salm regarding this matter. Will you tell the Court of those conversations?

A. I can only say that we had numerous conversations as we began to approach the estimated quantity of ballast as set forth in the general contract. We began to get more and more concerned about having a final firm quantity and it became a more and more frequent topic of conversation as we were becoming more pressed for this information.

Q. During the course of your stock-piling of this ballast did you run measurements of your own?

A. We had two methods of measurement for approximating the quantity that we had in the stock pile. We kept a load or vehicular measurement which we corrected with our own factors to estimate the comparable quantity that that would produce loaded in railroad cars. The other method was actual stock-pile measurement. We retained a crew, a party chief, a man by the name of Rutledge, who worked for the Corps of Engineers for a while and later, I believe, for Lookout Point Construc-

(Testimony of David E. Thompson.)

tors [245] to do this measuring for us. He was a competent party chief.

Q. Just prior to your cessation of stock-piling ballast what was your measurement as to the quantity?

A. In late November I believe it is shown in our daily job records, either November 22nd or November 24th, to the best of my recollection, November——

The Court: Did you have a diary on the job?

The Witness: Yes, we had a daily job diary.

The Court: I wonder where the diary is?

Mr. Ratcliffe: It's here in the courtroom, your Honor.

The Court: All right.

The Witness: I recall further, your Honor, that on November 24th we wrote a letter, I believe, to Lookout Point Contractors advising that the next day we were going to cross-section the stock-pile; that we made arrangements to do that; that we made that cross-section and then from then on we kept very careful vehicular measurement till the completion of the job. And on the basis of that cross-section plus the additional material deposited in the stock pile we determined our best estimate of the final quantity which was something slightly under 60,000 yards.

Q. Getting back to the conversation which you had with Mr. Huncke in early September, was there any written verification of that?

A. I do not believe we referred to that conver-

(Testimony of David E. Thompson.)

sation in [246] writing. But we did on September 14th write a letter, the last paragraph of which I believe was a request for a decision on the final quantity of ballast to be required.

I believe we made the statement that if no decision was forthcoming we would be governed by the quantity specified in the general contract.

Q. Did you get a response to that letter?

A. We got a letter in answer from Mr. Huncke—I believe the letter was dated September 22nd—wherein he advised he would provide us with the quantity within a period of two weeks.

Q. Was that—

The Court: Does anybody have that letter?

Mr. Ratcliffe: I think that letter is in evidence.

The Court: I remember now.

Q. (By Mr. Ratcliffe): At any time were you notified by Mr. Huncke or by representatives of Lookout Point Constructors that they were not going to furnish you this quantity?

A. Our first notification came following this previous subject we have been discussing. Our answer from Mr. Huncke resulted in a second letter of request from us, I think, in November, November 14th. Following that letter we had a reply from Mr. Huncke in his letter dated December 3rd wherein he advised that it was his opinion that it was our responsibility to determine the quantity of ballast. [247]

Now, I believe that was the first indication we

(Testimony of David E. Thompson.)

had that we would be required to determine the quantity of ballast.

Q. Now, on this matter of the ballast itself, will you please explain to the Court how you acquired the rock to make this ballast? There has been some testimony here regarding a coyote blast. Possibly you can start there and explain to the Court how you get this ballast.

A. Under the terms of the general contract I believe there are two quarry sites specified and, further, that the contractor has the option of finding other sites subject to the approval of the Government.

We elected to produce our ballast from a quarry site where a previous ballast contract had been executed. We did that because we thought there would be less risk in producing acceptable rock in a quarry where acceptable rock had already been produced.

In order to obtain the rock for the purpose of crushing it had to be loosened or blasted or removed from its in-place position. This particular quarry had been worked to some extent, and our problem was to obtain a quantity of rock necessary to meet our requirements from a high, sheer, vertical face. The most accessible and the easiest part of the rock was determined not acceptable by the Corps of Engineers inspection representatives. So in order to obtain a large quantity [248] of rock to produce this quantity of ballast we elected to blast or shoot this rock by the coyote method, which

(Testimony of David E. Thompson.)

consists of driving a small adit into the face of the quarry, going back a specified distance, and then laying out a shot or a blast in such a manner that you will produce the estimated quantity that you need.

In our case I believe we went back approximately 120 feet. On the back of the adit we teed out at right angles on the back of the adit at approximately 45 degrees. At a mid-point we teed off from this adit a distance of approximately 35 feet on each side. And these four ends of the tee sections added to the adit we placed quantities of powder, the total sum of which was about 19 tons. We connected these four deposits together by primer cord and back-filled the tunnel and detonated them all at once, producing one shot, which gave us the quantity of rock we required for the entire project.

Q. In moving this rock that has been blasted and getting that to your crusher what is the procedure there?

A. The procedure to handle that rock to the crusher was executed principally by the use of trucks and shovel. We had an extremely high face, over 200 feet of vertical face. It was necessary to work that deposit safely to benches in order—that is, to divide it into two elevations and work off two level portions, one the original quarry floor and [249] another one approximately half-way up the deposit of shot rock. That was necessary because the nature of this shot produced some

(Testimony of David E. Thompson.)

very large rock and boulders. And to work a vertical face of 200 feet in height would mean undercutting some of these large boulders with a shovel and risking the possibility that they would fall on the shovel or injure some of the personnel, or something of that nature.

So our procedure was to bench this quarry in two lifts.

Q. So that you ended up with a lower lift and an upper lift? A. That is right.

Q. And removed rock from both lifts?

A. That is right.

Q. What was the final date of the rock-crushing operation?

A. To the best of my recollection we stopped making rock on December 22nd.

Q. And on December 22nd how much rock was still available for crushing?

A. To the best of my ability to estimate it, it was about 20,000 yards. Our original estimate of the quantity of rock shot was 80,000 yards. That was not only my estimate but the estimate the party chief and the crew that cross-sectioned the quarry for us to determine the position of the adit and did our precision layout work for us.

Q. Is it customary, is it your practice and your experience [250] to shoot more rock than would be required for the job?

A. No. It is our custom to control that as closely as possible, considering, of course, that it is cheaper to shoot a little more than you need

(Testimony of David E. Thompson.)

than to, say, go back a second time and prepare a second shot.

In this case it was—we only made one shot. We had no experience record or no previous information on exactly how the rock in this quarry shot and we got more rock actually than I expected. We got more back break, as it's called, than I would expect. We had an unusually high quarry face.

Ordinarily a 210-foot face is not shot with one shot. But in this particular case it was the best we could do with the quarry site we had. [251]

* * * * *

Q. Mr. Thompson, were there any statements made to you by any of the representatives of Look-out Point regarding their own estimates as to the quantity of ballast that would be required?

A. I recall one conversation with Mr. Salm which I considered pertinent to this problem. He at one time—— [256]

Q. If I may, do you recall where and when that conversation was?

A. I don't recall when, but it happened, I believe, sometime between our letter of September 14th and our letter of November 14th requesting this specific figure. And the conversation took place in Mr. Salm's office. We were discussing this problem of ballast quantity and he advised me they were having difficulty in making a determination, and I believe that there were three parties in his organization that had made separate deter-

(Testimony of David E. Thompson.)

minations and had gotten three different answers. I believe, if I remember correctly, Mr. Salm said he had arrived at the greatest quantity of the three. And I recall this conversation later. It entered into my mind that this inability to agree on the quantity may have been one of the reasons why the responsibility or the attempt was made to place the responsibility on us.

Q. Mr. Thompson, how long have you been engaged in this type of work?

A. More or less since I graduated from school in 1941, with the exception of the time I spent in the Air Corps.

Q. How long were you in the Service?

A. Three years.

Q. Three years. That would be approximately eleven years actively engaged, is that correct?

A. Yes, sir. [257]

Q. In your experience during those eleven years in which you were actively engaged—

Mr. Haessler: Excuse me. For the record, if he wasn't actively engaged in this work while in the Air Corps, I think it doesn't total eleven years.

Mr. Ratcliffe: Oh.

Q. Did you say three years in the Air Corps?

Mr. Haessler: Pardon me.

The Court: I am sorry; I didn't hear.

Mr. Haessler: This job was in '51, wasn't it?

Mr. Ratcliffe: I am taking him up to the present time.

(Testimony of David E. Thompson.)

Q. You are still engaged in this type of work, are you not?

A. Yes, sir; in general construction.

Mr. Haessler: Pardon me.

Q. (By Mr. Ratcliffe): During the approximately eleven years you have been engaged in this type of work has it all been this particular type of work; that is, having to do with rock ballast aggregate and that type of thing?

A. It has not all been in that particular type of work. It has been all types of general construction work.

Q. All types of general construction?

A. I should not say "all" because that's not the proper work. But in many types of general construction.

Q. Mr. Thompson, how many years would you estimate you have spent in this particular type of work? [258]

A. You are speaking of production of ballast only or handling of rock and rock products?

Q. Rock and rock products.

A. I would estimate seven or eight years.

Q. Well, in your experience in dealing with rock and rock products can you tell us the general custom and the usage regarding the responsibility of a purchaser as opposed to the supplier of rock and rock products wherein the contract specifies an estimated quantity to be stock-piled by a given date, as to whose responsibility or obligation it is to determine the exact quantity that will be required?

(Testimony of David E. Thompson.)

A. Within the scope of my experience it is the responsibility of the buyer to determine that quantity. [259]

* * * * *

Cross Examination

Q. (By Mr. Haessler): Mr. Thompson, you have testified that there was a meeting between yourself and Mr. Huncke and other persons before the signing of this contract, at which Mr. Huncke stated that the defendants would furnish you with definite quantities required [260] for the job; is that correct? A. Yes, sir.

Q. Once again, when did that meeting take place, please?

A. To the best of my recollection, in late March or early April.

Q. Late March. Where did it take place, please?

A. The meeting took place in a hotel room in Pasco, Washington.

Q. Who was present at the meeting, if you please?

A. Mr. Curtis, Mr. Huncke, myself, and I believe for a short while that a Mr. Franco was there. I don't know.

Q. Who? A. A Mr. Franco.

Q. Thank you. What time of day was the meeting, do you recall?

A. I don't recall. I have a vague recollection that it was close to noon. I do not recall exactly.

Q. What was your understanding as to what he allegedly said he would do? Did you understand

(Testimony of David E. Thompson.)

that he would furnish you with the quantities you required before you commenced work on the job or as the job went along, or from time to time up to the completion date of the job?

A. It was my understanding that he said he would provide us with the quantity required to our completion of the crushing of the ballast. [261]

Q. Prior to what, please?

A. To our completion of the crushing of the ballast.

Q. By that did you mean prior to the date in the subcontract when you were required to complete it or prior to the time when the final gravel would be required for the job?

A. It was my understanding it would be prior to the date set forth as the date to be specified that the production of ballast would be complete.

Q. In other words, prior to October 11th, 1955?

A. Yes, sir.

Q. '51? A. Yes, sir.

Q. Pardon me. Was it your understanding, then, that the defendants were obligated under the contract, under the terms of the contract, to furnish you with exact information prior to October, 1951, as to the quantities required?

A. Yes, it was.

Q. It was your understanding that they were obligated under the contract?

A. It was my understanding—I beg your pardon. There is a difference. Are you asking me whether Mr. Huncke—it was my understanding

(Testimony of David E. Thompson.)

that Mr. Huncke assured us that he would or whether they were under the contract?

Q. Was it your understanding that the defendant was obligated under the agreement, the agreement embodying the writings and [262] anything else you thought constituted a part of it?

A. It was my understanding; yes, sir.

Q. It was your understanding that they were obligated to furnish you that, that it was not a matter—a matter of courtesy to you or of trying to help you out?

A. It was my understanding it was a matter of commitment.

Q. Matter of commitment and not a matter of courtesy. And the only written evidence of such alleged commitment, however, I take it, is the letter from Mr. Huncke to you dated September 21, 1951, which you refer to, in which—to refresh your memory I will read you:

“We appreciate your efforts to complete this work within the time allowed, and I assure you we will cooperate and give you any help which we can. We have as yet not made any calculations of the amount of ballast required other than the quantity as set out in the specifications of 56,000 cubic yards of ballast material. I have, however, requested that Mr. Salm and Mr. McDowell recalculate these quantities so that we can give you an accurate determination of the requirements for the work. This will be furnished you within the next two weeks.”

(Testimony of David E. Thompson.)

Now, is that the letter that you referred to as the written authorization from Mr. Huncke subsequent to signing [263] the contract which evidenced that he was committed to furnish you with the quantity?

A. That's the letter I referred to in my testimony. I believe there is one other letter in which Mr. Huncke acknowledges that he intended to furnish us with the final quantity of ballast, a later letter, I believe, April 14th or thereabouts.

Q. And is that in evidence?

A. That I don't know.

Mr. Haessler: Yes. If I may have it, that will be Plaintiffs' 2-G.

Q. Now, going back to the two letters—going back to these writings concerning the alleged commitment, this letter of September 21 from Mr. Huncke said this:

“We will cooperate and give you any help which we can.”

Did you send a reply to that letter advising Mr. Huncke that he was committed to give you the information?

A. We sent a reply to that letter again asking for the quantity. Our letter of November 14th.

Q. Did you take issue with the fact he said he would cooperate and give you help rather than saying that he was committed or obligated to furnish it?

A. That was a point I didn't consider in attempting to obtain the final quantity, whether it

(Testimony of David E. Thompson.)

was a matter of courtesy or commitment. [264]

Q. At that time, based on the prior alleged oral discussion, you just assume he was committed?

A. I assumed he was committed. I did not gather—perhaps I did not properly interpret that letter. But I did not actually realize that he did not intend to furnish us until his letter of December 3rd.

Q. If you had thought about those words and had realized or it had occurred to you that he meant this merely as a matter of cooperating with you and trying to help you, would you have written him a letter telling him he was committed?

A. I believe I would have then referred to the verbal agreements.

Q. I see. Thank you. Now, I would like to invite your attention to Mr. Huncke's letter of December 3rd, 1951, addressed to you, Mr. Thompson, wherein he says this:

“We have your letter of”——

The Court: What exhibit is that, please?

Mr. Haessler: Defendants' Exhibit 4-F, a letter from Mr. Huncke to the witness dated December 3rd, 1951.

Q. In this letter Mr. Huncke says:

“I am sure that by the terms of our agreement that Curtis Gravel Company is obliged to produce all ballast material required irrespective of the quantity needed. It is our thought that a very careful check of the quantity of material required

(Testimony of David E. Thompson.)

might reveal [265] an error in the specified quantity and as a matter of courtesy we intended to call any such error to your attention. It appears from our investigation, however,"—and so on.

"I am sorry that we are unable to give you any more definite or accurate information. It is our suggestion that you take off the quantities from the plant and base your production of material on the quantity which you believe will be required."

Now, that letter was addressed to you. Did you send any reply to that letter, informing Mr. Huncke that the defendants were committed to furnish ballast?

A. We replied to that letter by our letter of April 5th.

Q. Did you send any reply other than your letter of April 5th?

A. That was when I left the project.

Q. I see. In other words, you received this letter on December 3rd which, again, related that this matter was a matter of courtesy and this time it's merely spelled out in the letter and you sent no reply; you went ahead and dismantled your plant and pulled out and then months later you sent the letter of April 5th?

A. No, that is not correct, sir. We did not dismantle our plant at that time. [266]

Q. All right. Well, now, coming to your letter of April 5th which was your reply some four months later, this letter of April 5th sets forth the previous letters we have gone over reference

(Testimony of David E. Thompson.)

your letter and sets forth the letter of September 14th, a letter of September 21, the letter of November 24th, and a letter of December 3rd. In this letter in explaining on the matter of quantities you say this:

“We are not railroad contractors and have no experience in the application of ballast and the amount of shrinkage, loss and waste pertinent thereto; consequently we are unable to make a close determination from the plans. We recognize that we are obligated to maintain a plant for the production of ballast for the life of the original contract, which we did; however, our plant equipment without shovel and hauling equipment rents of approximately \$40 per hour, which should make it quite obvious we cannot maintain a plant at the project indefinitely without building up a very considerable sum for additional reimbursement.

“It is our opinion that we cannot reasonably be expected to make an exact estimate of the amount of ballast required. It is our further opinion that we did everything possible to obtain a final [267] quantity of material and that your organization was obligated to provide this information inasmuch as you established a completion date for ballast much earlier than the original contract completion date. It is also pointed out that we made approximately 4,000 cubic yards of ballast in addition to the contract quantities at the risk of receiving no payment for this material.

“It is now our opinion after reviewing the situ-

(Testimony of David E. Thompson.)

ation carefully that we are not obligated to produce any additional ballast.”

Well, now, referring to this letter, in this letter you refer to all the previous correspondence. This letter purports to reply, according to your testimony, to Mr. Huncke's letter of the 3rd stating that he was going to give you information on quantities as a matter of courtesy which is also—also the words “cooperate” and “help” appear in the letter of September 21. Why did you in this letter refer to the correspondence and make no reference to this alleged commitment from an oral meeting, a statement of Mr. Huncke?

A. I don't—I cannot give you any specific answer for that. I wrote what occurred to me as being pertinent at the time. We had asked already many, many times verbally, we had written two letters specifically requesting this figure, and [268] it was quite obvious to us that Mr. Huncke intended to refute——

Q. Intended to what?

A. Intended to refute any previous commitment he had made on that point.

Q. But why didn't you when he denied that commitment in two successive letters addressed to you as part of the correspondence, why didn't you—he negated any knowledge of any such commitment. He used the word “cooperate.” He used the word “courtesy” here. You write the letter, you state, a reply four months later, which purports to be a summation of all the evidence mate-

(Testimony of David E. Thompson.)

rial on the question and you do not make the assertion in this letter or in any other letters that there ever was a commitment based on this alleged oral understanding between you and Mr. Huncke. Aren't you a little surprised that, yourself—that if you had this thought in mind that you never wrote anything about it?

A. No, sir; I am not. I intended this letter to be a different approach. As I previously explained, it was obvious to me that Mr. Huncke intended to refute his agreement. We made the approach on the basis that we weren't qualified to make the estimate.

In other words, we attempted once more on another basis to get a figure or to appeal to Mr. Huncke to get this figure.

Q. All right. Going back to the earlier part of the cross [269] examination, you stated that if you had—if your attention had come to the words “cooperate” and “give you help” in this letter of September 21, so that if you had thought there was any possibility that Mr. Huncke was offering to give his suggestions or his advice or his determination of the matter as a matter of cooperation, that you would certainly have replied to that letter and reminded him of his commitment. Do you recall having testified to that a few minutes ago?

A. Yes, sir; I said that I would possibly have referred to the verbal commitment.

Q. I don't believe you said “possibly”; I believe

(Testimony of David E. Thompson.)

you said if you had been apprised you would have done so.

A. I believe I said I would have probably.

Q. All right. But, your answer was you just didn't notice the words in that letter. Then, I directed you to the letter of December 3rd in which it is spelled out again, which he states definitely he is doing as a matter of courtesy and again certainly you didn't feel it necessary to make any—your answer is you did make an answer on December 5th which purports to be an entire summation of the agreement on the part of all the parties. How do you explain your absolute silence, the complete lack of any written understanding whatsoever of this alleged oral statement of Mr. Huncke's in Pasco, Washington, which is at variance with the writing of the contract and from anything which appears in any correspondence or assertion?

A. Sir, the implication that that is a complete summation of the problem is yours and not mine.

Q. All right.

A. I did not refer to the other verbal discussions in the discussion that I had with Mr. Huncke at Dexter nor the discussions with Mr. Salm either. In other words, this was a new attempt at a different attack on their problem. It attempted to explain to Mr. Huncke that we did not feel that we were capable, one last attempt to get a figure.

Q. Wouldn't it have been reasonable when his letters indicated he was going to furnish you this information as a matter of courtesy to have written

(Testimony of David E. Thompson.)

to him and said, "You are obligated under our oral understanding independent"—"You were obligated under our oral understanding at that meeting at Pasco to give us the quantity"?

A. I don't feel that would have done any good, sir.

Q. You don't feel. Well, then, why did you feel that you would have replied to that effect to his letter of September 21 that you had noted the language speaking about "cooperating and giving you any help we can"?

A. I mean this interpretation comes after all the rest of this procedure. At that time I did not catch the trend or did I understand that he was going to renege on this commitment or my approach would have been different.

I did not actually understand that till after another [271] exchange of letters which ended in a similar——

Q. In other words, as I get your testimony, you did not question the words "cooperate" and "give you any help which we can" in the first letter. You did not write him back and say, "This isn't a matter of cooperation; this is a matter of commitment" because you didn't see the wording in the letter; otherwise you would have replied to that effect, so you told me.

A. No, sir; I don't believe I would because it was my understanding from that letter that he was going to provide us with the information within a

(Testimony of David E. Thompson.)

period of a few weeks and whether it was through courtesy or obligation it did not matter at that time so long as we got the information.

Q. And when did it become your obligation that he was not as a matter of commitment going to furnish you——

A. When I received his letter of December 3rd, then I understood.

Q. At that time why didn't you call his attention to this alleged commitment if it in fact existed?

A. This matter had been discussed, as I said, numerous times. Twice with Mr. Huncke and many times with Mr. Salm. And it resulted in several exchanges of correspondence and I felt it was hopeless.

Q. In none of which the commitment—didn't you think that it might have encouraged a reply; if you tell somebody you have [272] to do it under the terms of the agreement you are more apt to get a reply that if you say, "Please do it," aren't you?

A. I don't necessarily agree with you there. [273]

* * * * *

Q. Mr. Thompson, when was the plant dismantled?

A. Are you speaking of the matter of ceasing production or——

Q. No. I mean when was the rock-crushing equipment dismantled so the plant could no longer be operated?

A. May I answer and explain? I believe in

(Testimony of David E. Thompson.)

March, in about the middle of March. This plant was so maintained on the job that it could have been operated up until—with a small amount of work or comparatively small amount of work, or be put in operation at any time until the equipment was actually hauled away.

In other words, when we ceased production [274] of ballast we maintained a portion of our crew repairing and maintaining the plant in order to keep a level work load. And when you say dismantled, we removed some of the parts, engines and motors, to accomplish work. But nevertheless the plant could have been operated.

Q. Excuse me. When was the plant dismantled so that it could no longer be operated?

A. It would be in late March, I believe, before it would be past the point of operation again.

Q. In other words, you kept the plant there until late March?

A. Yes. In other words, we kept—we kept the substantial portion of the plant there so that it could have been reopened.

Q. I couldn't quite hear the last part.

A. We kept a substantial portion of the plant there so that it could have been made operable with a small amount of work in a short period of time.

Q. Now, was there a supply contract or a construction contract, your subcontract?

A. To the best of my understanding of the contract, we had both features in our subcontract.

(Testimony of David E. Thompson.)

Q. Both construction and supply?

A. Yes; the Item B, the furnishing of ballast, was, in effect, a supply item. [275]

* * * * *

Q. Well, let me ask you one last point: When did you first determine in your mind that Mr. Huncke and the rest of the defendants were not going to furnish you with exact quantities required on the job prior to—were not going to prior to—let me rephrase that question. When you received this letter of December 3rd from Mr. Huncke addressed to you in which he stated that you were required to produce all the ballast needed for the job and that as a matter of courtesy the defendant was going to—as a matter of courtesy the defendant intended to call to your attention any obvious error in requirement, did you believe after reading that letter that they were going to furnish you with accurate determinations of the ballast required at that time?

A. The receipt of that letter was the first time that I actually understood that they did not intend to provide us with the quantity, if that is what you are getting at.

Q. All right. This is the first time you fully understood it? [278]

A. This is the first time I fully and completely understood that we were not going to get the quantity from him.

Q. Is it your understanding that they would

(Testimony of David E. Thompson.)

never furnish you with a quantity or that they would merely furnish you with their needs as the job went along?

A. As I recall, I formed no conclusion in that vicinity. I did try once more in a letter of April 5th to get an answer again.

Mr. Haessler: We have no further questions, your Honor.

The Court: Redirect.

Mr. Ratcliffe: Counsel, is this letter of April 5th that you have read from, has that been offered and admitted?

Mr. Haessler: Yes. That's your exhibit. Every letter I have read from is in evidence.

Mr. Ratcliffe: I just wanted the number.

Mr. Haessler: Your No. 2. Yes, Plaintiff's No. 2.

Redirect Examination

Q. (By Mr. Ratcliffe): Mr. Thompson, I think there was some comment regarding the matter of completion of the stock-piling in the subcontract being specified as October 11th, 1951; is that correct? A. Yes, sir; on or before.

Q. When was the stock pile actually completed?

A. We ceased production of ballast December 22nd. [279]

Q. Between these dates or sometime prior to these dates were any discussions had with representatives of Lookout Point Constructors regarding the completion date?

A. Yes, sir. The conversation was with Mr.

(Testimony of David E. Thompson.)

Salm. The point was that we were operating, I believe, in September on a two-shift basis and in an attempt to make the ballast by the specified date in our subcontract, and it was apparent at that time that they were not going to need the ballast or need all of the ballast as early as they had previously anticipated. With that in mind we requested that we be given permission or be given their verbal blessing to extend this time a little for our own convenience. And Mr. Salm advised me that he could see no reason why there would be any difficulty if it took several more weeks to finish the production of ballast. And so we, I believe, around the 1st of October went back to a one-shift operation. It was solely for our convenience and their courtesy to us.

Q. While you were on this job were there ever any complaints made on behalf of Lookout Point that they were being delayed or urging you to hurry and finish your stock pile?

A. I believe Mr. Huncke wrote one letter criticizing the speed at which we were producing ballast early in the—early in the production of the ballast. But I believe by this time that he, too, was satisfied.

This is merely my opinion, since I did not talk to [280] him about it specifically. But I did talk to Mr. Salm and he was satisfied that we would complete it in such a manner that they would neither be delayed or damaged or inconvenienced in any way. [281]

* * * * *

DOUGLAS SALM

produced as a witness on behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ramacciotti): Mr. Salm, you were, according to the stipulation in this case, one of the representatives of the defendants at Lookout Point?

A. That is correct.

Q. Do you recall when it was that you started your work there? A. June of '51.

Q. Do you remember when your work ended and you left? A. August 15th, '52.

Q. Now, during that time what was your official capacity or your title or your designation?

A. Superintendent.

Q. During that time, as I understand the claims and contentions here, there was certain ballast brought to the job site from Springfield?

A. That is correct.

Q. Do you remember about when that was?

A. I believe during the month of June.

Q. June of 1952? A. '51.

Q. '51? [288] A. Yes, sir.

Q. Are you sure of that?

A. If I understood your question—what was your question again, please?

Q. The question was when the ballast was brought to the job site from Springfield, from the independent suppliers at Springfield.

A. Well, there was two parts, of course. Part A we got ballast from them and also Part B.

(Testimony of Douglas Salm.)

Q. Well, there is a contest here of the question as to the cost of bringing ballast from Springfield to complete—

A. Oh. That was Part B.

Q. —Part B, yes. A. Yes.

Q. Now, when did that ballast come?

A. That ballast shipment began, I believe—I believe it began the latter part of May or first of June of '52, maybe a little later. I don't recall the exact date at this time.

Q. Did you procure that ballast or make arrangements for it?

A. Yes.

Q. At Springfield Sand and Gravel Company?

A. That is correct.

Q. It was brought by railroad; that is, by Southern Pacific to a certain point, was it not?

A. To the Jasper switch.

Q. To the what?

A. To the Jasper switch.

Q. To the Jasper switch?

A. On the new construction.

Q. That is the terminus or that was at that time the terminus of the railroad's property?

A. That was the connecting point of the new construction to the existing S. P. line.

Q. In other words, at that switch the new construction work took over and the track ran along that end under construction?

A. That is correct.

Q. The relocated line of the Southern Pacific?

A. Yes.

Q. The cars and the motive equipment, the

(Testimony of Douglas Salm.)

engines, that brought the ballast from Springfield, brought it to the switch and left it there; isn't that correct? A. That's correct.

Q. Then it was picked up by the equipment of the defendant company by their engines and their own cars? A. (Witness nods head).

Q. As a matter of fact, the movement from Jasper was entirely—that is, after the cars and the ballast reached Jasper it was entirely upon the relocated line?

A. It was on the relocated line but not on [290] our portion of the construction.

Q. But it was on the——

A. It was on the relocated line.

Q. It was on the relocated line of the Southern Pacific? A. Yes.

Q. As referred to in the contract we are talking about? A. Yes.

Q. Now, was the Plaintiff's quarry and crushing equipment on your portion of the line as you referred to it?

A. No. It was on the portion constructed by the Utah Construction Company. [291]

* * * * *

L. W. HUNCKE

produced as a witness on behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows: [292]

* * * * *

Redirect Examination—(Continued)

Q. (By Mr. Ramacciotti): You, likewise, pre-

(Testimony of L. W. Huncke.)

sented a claim to the Corps of Engineers in connection with the extra cost of ballast, did you not?

A. Yes, I did.

Q. Talking about all of the claims that you submitted?

A. Yes, sir.

Q. And that was a claim for some nine thousand-odd dollars?

A. Substantial claim.

Q. And that is the amount that represents a part of the withheld moneys from the amount due to the Curtis Gravel Company, isn't that true?

A. No. We don't consider that as being withheld moneys. It was the cost of finishing Curtis Gravel Company's work.

Q. Well, now, in the Agreed Facts in the pre-trial order in this case, Mr. Huncke, it is recited that you procured certain 12,000 cubic yards of ballast at Springfield, to which cost you added the transportation charges, or some charges for transportation, making a total of a certain amount, [309] deducting therefrom the amount that would have been paid Curtis Gravel Company had that same amount of ballast been furnished by Curtis Gravel Company, and the difference or net was \$9,872.70; that's correct, isn't it?

A. I believe it is.

Q. Now, you withheld that sum from the amount due Curtis Gravel Company on your final statement to them when you made your final remittance under the contract?

A. We charged their account with that amount of money.

(Testimony of L. W. Huncke.)

Q. You charged their account and withheld that amount of money?

A. We charged their account.

Q. And withheld it?

A. Certainly. It was a debt account.

Q. And then having taken it from moneys that would otherwise be due Curtis Gravel Company, you then proceed to make a claim on the same item, the same amount, against the Corps of Engineers?

A. I believe that's substantially correct.

Q. And you did that in your behalf, likewise?

A. Yes, sir.

Q. Seeking double payment, is that correct?

A. No, sir.

Q. What? A. No, sir. [310]

* * * * *

L. W. HUNCKE

produced as a witness in behalf of the Defendants, having been previously sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Haessler): Mr. Huncke, you are the President of the William H. Smith Contracting Company of Missouri, is that correct?

A. That's correct.

Q. Will you please advise the Court of the circumstances and the background giving rise to the events which took place leading up to the consummation of the contract between yourself and between the defendants and the plaintiffs in this case?

(Testimony of L. W. Huncke.)

A. The Curtis Gravel Company was contracting with Smith Contracting Company on a job at McNary Dam about the time we acquired the work at Lookout Point. They had just finished producing ballast and we knew them slightly and we asked them to bid along with three or four other contractors in the Portland area on a portion of the work which we decided to have performed by subcontract on our Lookout Point job.

I believe that we asked Mr. Curtis to give us a bid about the middle of March. Shortly thereafter, within a week, we received a bid from Mr. Curtis, and subsequent to that bid we had a conversation concerning the work to be done and we had conversations at that time with other contractors.

We prepared a subcontract based on Mr. Curtis' bid [312] and based on the requirements of the contract—general contract—that, I believe, was submitted in early April.

Mr. Ramacciotti: What was the date, please?

The Witness: Early—I would say about the 10th or 12th.

Mr. Ramacciotti: Of April?

The Witness: Something like that; within a very few days, I believe. It was about the 15th of April Mr. Curtis called me on the telephone and said that the subcontract agreement differed in some respects with his proposal, particularly having to do with a small item as asphaltting a bridge structure and also having to do with the completion date on a section of the work which he considered to be relatively impossible and on one or two other

(Testimony of L. W. Huncke.)

very small items of work or language. We agreed with him that the changes that he suggested were in order and that we would make those changes. And I believe on the 22nd or 24th day of April we forwarded Mr. Curtis a revised subcontract. The two subcontracts were identical in their general scope and the general requirements, quantities and prices, but there were certain differences that he had asked us to incorporate in the revised contract and we incorporated those without further discussion with him.

We didn't receive the contract back immediately, and I have a notation in the file that we called Mr. Curtis approximately on the end of April asking that he return the signed document. And the notation shows that he had had some [313] personnel difficulty which precluded him from at the moment getting the performance bonds or payment bonds or executing the contract and it would be slightly delayed, but it would be forthcoming. In May, I believe, Mr. Curtis went to work and he started on what we call the north side of the Willamette River; that's in an isolated spot. His work involved only the roadbed topping and his work was dependent upon the progress of another contractor. And it was work which was somewhat isolated. And, although the Government was in a hurry to get it, they hadn't provided the area for the other contractors to work in so there was some delay in accomplishment of that work. But I believe it was fully accomplished in June.

(Testimony of L. W. Huncke.)

About the same time, or possibly in June, I think, Mr. Curtis went to work on the left bank or the major portion of this contract. To what extent he went to work I don't know. But I think the record shows that he started to work, started to open up a quarry or to follow the Utah Construction Company in the quarry that's now known as Quarry Site B. I don't have much knowledge of what transpired on the work until, I believe, about the end of August, other than from looking at daily reports and other information given me by our superintendent. It appeared the work was going very slowly and sometime, I believe, in the latter part of August or first part of September I made a trip to Lookout Point site. [314]

I looked over the site and the work that was accomplished and the progress of other contractors which affected our progress and I had a conversation, a very brief conversation, with Mr. Thompson who represented Curtis Gravel Company at that time. The principal subject of discussion was the progress in getting roadbed topping on the subgrade as rapidly as it was turned over to us by the Government. Our progress in that regard had been very slow and they assured me that they either had entered into an agreement or they would enter into an agreement with another contractor at Meridian to take over a portion of the roadbed topping work or to produce the material for the roadbed topping.

(Testimony of L. W. Huncke.)

I left very shortly thereafter. I only, probably, talked to Mr. Thompson half an hour at the most and left. I don't know whether I was back on the Lookout Point job again or not, but I might have been on the Lookout Point job during the winter.

My touch with the job was through our reports and Government reports to us. I knew in general what progress was being made by our company as well as our subcontractors on the work. I had some general ideas of the progress being made by others and the problems in general, but I was not at the site.

About early spring of the following year, 1952, I was informed that Mr. Curtis was going to dismantle and [315] move his plant. I had been informed by the Corps of Engineers that he had taken this action or started this action in January. And in conversation or in some discussions with their representatives I understood that what they had done in January was to remove the power plant, probably for overhaul. So that I knew along about February they were moving this plant. And I believe that I was informed that they would move it in its entirety, I think, the first week or so of March. I wrote Mr. Curtis at that time. And I had previously either written or discussed with him the obligations of the Curtis Gravel Company under our subcontract and the problem that they faced if they moved this plant and had not produced a sufficient stock pile of material which would meet the specifications.

(Testimony of L. W. Huncke.)

There was always the thought in my mind that the material that they had manufactured——

Mr. Ramacciotti: I object, if your Honor please, to such thoughts as he might have personally on some subject that's not related.

The Court: Yes. The Court acknowledges that this is just the witness' statement about it.

The Witness: I was just going through it as thoughts occurred to me. I can proceed, anyway.

Mr. Haessler: You continue, please, and don't advise the Court as to what you thought but as to what you said and did, if you would, please, the facts given you. Give the facts. [316]

A. I wrote Curtis Gravel Company and told them that I had no——

Mr. Ramacciotti: Mr. Huncke, could you fix the date of this?

The Witness: I would say it was early March.

Mr. Haessler: If the Court please, I will hand the witness Defendants' Exhibit 4-K.

The Witness: This is dated March 14th. At this date I understand that they had completely dismantled their plant. We had no objections to them dismantling their plant, provided they recognized their obligation to produce the requirements for the work. And, in fact, I had never insisted that they place a crushing plant on the job because their obligation was to produce——was to furnish us crushed stone ballast meeting the specifications in railroad cars, and just how they went about it was no concern of ours. So that the fact

(Testimony of L. W. Huncke.)

that they moved their plant was, as far as I was concerned, within——

Mr. Ramacciotti: Now, if your Honor please, the witness is testifying to what was all right as far as he was concerned and not narrating facts or actual communication between the parties. It's mostly just a personal feeling about the things.

Mr. Haessler: I will confine the questions, make the questions not so broad. I think that would eliminate it.

Mr. Ramacciotti: I think that would. [317]

Mr. Haessler: I was trying to save time.

Q. At the time you wrote the letter of March 14th was the plaintiff performing under the subcontract at that time? Were they doing work under the subcontract on March 14th, 1952?

A. Yes.

Q. What work were they doing?

A. Well, as far as I know,—the records will show—they were moving slides, perhaps doing roadway shaping, fencing, or whatever the obligations of the contract were. I don't know exactly what work they were doing.

Mr. Ramacciotti: I move that the answer be stricken. In the first place, the answer was "As far as I know," they were doing this and that and the other. And then he ends up by saying, "I don't know just what they were doing, so I think——"

Mr. Haessler: You make strike the answer.

The Court: I acknowledge the witness is not speaking from personal knowledge.

(Testimony of L. W. Huncke.)

Q. (By Mr. Haessler): Mr. Huncke, I hand you herewith a document which has been admitted in evidence as Change Order 23 and that document has been identified and admitted as our Exhibit 8-D, being Change Order 23 dated June 10, 1952.

A. Yes.

Q. I ask you to examine that document and in that document [318] you will find a reference setting forth the completion date of the contract as August 10th, 1952. Were there any extensions of the completion date beyond the date set forth in that change order?

A. I don't believe so. I believe this was the completion date.

Mr. Ramacciotti: If your Honor please, there is no question but what the date shown and referred to is, perhaps, an expiration date of a contract as a result of an extension that was worked out between the defendant and the Corps of Engineers, without the knowledge of the plaintiff or independently of the plaintiff. But the thought that I have in making this comment and objection is that the original contract did not expire on that date. That is the date of an expiration resulting from further negotiations between the Corps of Engineers and the defendants.

Mr. Haessler: Are you making an objection or a comment?

Mr. Ramacciotti: I say, this is immaterial.

Mr. Haessler: You are stating that the question is immaterial?

(Testimony of L. W. Huncke.)

Mr. Ramacciotti: Yes.

Mr. Haessler: It is our position, your Honor, that the completion date of this contract is August 10th, 1952. It is our position and has been from the first that we were obligated to do all the work specified by the contract. [319]

The Court: I understand your position. You may proceed.

Mr. Haessler: All right. Thank you.

Q. I now hand to you a document identified as Change Order No. 5 which we have listed for purposes of identification as our Exhibit 8-A. Will you examine that, please? Does your signature appear on that change order, Mr. Huncke?

A. Yes, sir.

Q. Can you identify that document as being in fact Change Order No. 5 issued by the Corps of Engineers in connection with this contract?

A. Yes, sir.

Q. Does that document, that change order, refer to an extension of time for performance of a part of the contract on June 10th, 1952? A. No.

Q. June——

A. The change order recites the reasons for delay and extends the time for completion of performance of Part A to 9 August, 1951.

Mr. Haessler: Thank you.

Mr. Ramacciotti: 9th of August?

Mr. Haessler: 9th of August, 1951. That's Part A of the contract.

(Testimony of L. W. Huncke.)

If your Honor please, I should like to offer that in evidence at this time. [320]

The Court: Any objection?

Mr. Ramacciotti: No, your Honor.

The Court: It will be received.

(Whereupon the document entitled "Change Order No. 5," previously marked for Identification as Defendants' Exhibit 8-A, was thereupon received in evidence.)

Mr. Ramacciotti: If your Honor please, I think that I will, if I may, please, withdraw my consent to the admission of this change order for the reason as pointed out by Mr. Ratcliffe, that we were not a party to it, knew nothing of it, and had no contact with anyone who had passed on to us the substance of it or the context.

The Court: Do you intend to link it up with the plaintiffs?

Mr. Haessler: We intend to link it up in this manner, your Honor: That this was an extension of Part A of the contract. We have previously submitted Change Order—an extension of Part B, a change order on that, and it is our position the plaintiff has attempted to create the erroneous impression that there was a completion date of this contract on February 16th. The sole basis of that is a provision in the general contract which sets forth various parts of the contract with various dates, under various times, when we were expected to complete those parts. This relates to Part A. The previous [321] change order relates to Part B.

(Testimony of L. W. Huncke.)

We are offering it to show the duration of the contract as a matter of the length of time it requires us and our subcontractors to perform and that these dates set in were regularly extended by the Government so that there is no significance as to whether or not the work was performed before or after a certain date once an extension was granted.

The Court: Well, is there any issue concerning penalties or anything of that nature?

Mr. Haessler: The only issue is the fact that the witnesses for the plaintiff and counsel for the plaintiff, I think they are going to try to urge the contention that the completion date of the contract was February 16th. The point is that we contend there is no basis for that and that this document is illustrative of that fact.

In other words, the completion date of this contract is when we get our work done; that there were various parts of the work had to be performed by a given date unless extensions were granted for that work and the contract itself makes provisions for those extensions. And we want to show that extensions were granted regularly, both before and after February 16th, relating to various aspects of the contract.

The Court: Let me see that a minute, please. Well, I want you to have your theory in the record so it will be [322] received along with your theory on it.

Mr. Haessler: Thank you, your Honor.

(Testimony of L. W. Huncke.)

The Court: This order extends the order.

Mr. Ramacciotti: May the record show, if your Honor please, that we were not, so far as the evidence thus far discloses, not apprised. We made our contract in June on the basis of the prime contract of January, 1951, and we relied upon that and did not have any part in any extensions of time.

The Court: I understand that.

Q. (By Mr. Haessler): Mr. Huncke, several witnesses have testified to the existence of an oral understanding creating a commitment on the part of the defendants allegedly the result of statements made by yourself in Pasco, Washington, under which you agreed to furnish them with advance information as to the quantities of ballast which would be required for the job. Were there any such commitments on your part?

A. No, there was not.

Q. Were there any reasons why it would be impractical or impossible for you to give such a commitment?

Mr. Ramacciotti: Wait just a minute. I object to that question as being in the realm of speculation.

The Court: Yes. Well, it calls purely for a conclusion of this witness, "Is there any reason why it would be impossible?" Why don't you ask him what his reasons were? [323]

Q. (By Mr. Haessler): Would you have been willing to give such a commitment at that time?

Mr. Ramacciotti: Objected to as immaterial.

(Testimony of L. W. Huncke.)

The Court: Yes. It will be sustained. This witness certainly can say without argument whether he did or did not make such commitment.

Q. (By Mr. Haessler): Would it have been possible for you to furnish the plaintiffs with advance information as to the precise amount of ballast required?

Mr. Ramacciotti: Objected to as incompetent, irrelevant and immaterial, and for the further reason that the witness testified that he was at the situs of this work on two occasions and that his absence was throughout the entire course of the work with the exception of those two times. Now he is asked whether or not it would be possible for him to do something and I think it is wholly immaterial for the statement of the record.

The Court: It will be sustained.

Q. (By Mr. Haessler): Were you asked to give a commitment as to agreement at this meeting in Pasco; were you asked to give a commitment that you would furnish advance notice of these quantities of ballast that would be required on the contract? A. Not to my knowledge.

Mr. Ramacciotti: What is that? [324]

The Witness: Not to my knowledge.

Mr. Ramacciotti: Not to your knowledge?

The Witness: That's right.

Mr. Ramacciotti: That is, you don't remember?

The Witness: I do not remember that.

Mr. Ramacciotti: Do not remember. All right.

(Testimony of L. W. Huncke.)

Q. Mr. Huncke, the Bailiff has just handed you Plaintiffs' Exhibit 2-B, dated 9-21-51. Will you read the last paragraph of that letter, if you please?

A. "We appreciate your efforts to complete the work within the time allowed and I assure you that we will cooperate and give you any help which we can. We have as yet not made any calculation of the amount of ballast required other than the quantity as set out in the specifications of 56,000 cubic yards of ballast material. I have, however, requested Mr. Salm and Mr. McDowell recalculate these quantities so that we can give you an accurate determination of the requirements for the work. This will be furnished to you within the next two weeks."

Q. Did you make that offer as a matter of courtesy?

Mr. Ramacciotti: Just a moment. I object to that as immaterial, what prompted the writing of the letter by this witness, whether it was courtesy or otherwise. [327]

The Court: Well, of course, to ask the witness was it a matter of courtesy is merely a matter of asking for a conclusion. Purely a leading question. Ask him why he wrote it.

Q. (By Mr. Haessler): Why did you write that letter, Mr. Huncke?

A. We attempted to be helpful to these people.

Q. Did you make—pardon me. Are you finished?

A. Yes, sir.

(Testimony of L. W. Huncke.)

Q. Did you make an effort to assist the plaintiff by giving them—by obtaining advance information as to the amount of gravel which was to be required for the job?

A. Read that, please?

Mr. Ramacciotti: Would you read that question back to me, please?

Mr. Haessler: I will rephrase the question.

Mr. Ramacciotti: I object to the question.

The Court: Counsel said he would reframe it.

Mr. Haessler: I will rephrase the question.

Q. Did you make any effort to determine in advance the quantities of gravel which would be required for the job?

Mr. Ramacciotti: Objected to as immaterial. If the witness were asked what he did, that would call for an answer that would be of some value.

The Court: He can answer that Yes or No and then [328] explain.

The Witness: I would like to know what you mean by advance. Of what? You mean in advance of that letter or later?

Mr. Haessler: Did your organization make any effort to determine the quantities after you sent that letter?

Mr. Ramacciotti: Objected to as calling for a conclusion and opinion of the witness. He could be asked what he did.

The Court: He can answer that Yes or No. He either did or he didn't.

The Witness: Yes.

(Testimony of L. W. Huncke.)

Q. (By Mr. Haessler): What did your organization do in an effort to determine——

Mr. Ramacciotti: I think this calls for speculation. He was only there twice, if your Honor please.

Mr. Keane: If the Court please,——

Mr. Haessler: He is the President of the organization, and I think the Court can take judicial notice that the president of an organization doesn't have to be physically present in order to know everything that is accomplished.

Mr. Ramacciotti: I contend that if he learned of things that were done in connection with this matter of making an effort to determine the amount of ballast required, it would be that he would be informed by hearsay. If there are letters [329] that bear out any contention or statement that he makes in that regard, the letters would be the best evidence; otherwise, if he was merely told, it is hearsay evidence.

The Court: Well, we don't know what the witness is going to testify to.

Mr. Ramacciotti: Well, we don't as yet; that's true, your Honor.

The Court: You may answer the question.

The Witness: Would you read it to me, please?

(Whereupon Mr. Haessler's last question to the witness was read by the Court Reporter.)

The Witness: Our superintendent made an appraisal of the requirements of the work by reference to other work that had been performed on that

(Testimony of L. W. Huneke.)

job by other contractors. Our Kansas City office made an analysis, an arithmetical analysis of the quantities required and our Los Angeles office did likewise.

Mr. Ramacciotti: I wonder, if your Honor please, at this point if we could ascertain when those analyses were made?

The Court: Can you supply that?

The Witness: Those analyses were made after the letter was written, and I can't state the exact date, but I would say October and, perhaps, November, 1951. [330]

Q. (By Mr. Haessler): Did you make any analyses before the letter was written?

A. I made none.

Q. Did you direct that any be made before the letter was written?

Mr. Ramacciotti: Objected to as immaterial. If there were none made, what difference does it make whether he gave directions?

The Court: Well, perhaps I misunderstood the question.

Mr. Haessler: I withdraw the question.

(Whereupon Mr. Haessler's last question to the witness was read by the Court Reporter.)

The Court: He may answer that.

The Witness: I know of none that were made.

Mr. Haessler: All right.

Q. Did your organization reach an accurate or a satisfactory determination of the amount of ballast that would be required for this job as a

(Testimony of L. W. Huncke.)

result of your investigation of the requirements made following the sending of the letter?

A. No.

Q. Why not?

A. It was decided after the various calculations and conclusions had been drawn by the superintendent that the matter at that time was indeterminate. [331]

Q. Why was it indeterminate?

A. We had no knowledge of the conditions of the subgrade that might exist at the time the work was actually performed. The Curtis Gravel Company subcontracted the roadbed topping and they were in a much better position to know of those conditions than we were. And, accordingly, we could give no better information that what was contained in the original contract.

Q. Who was obligated to prepare the subgrade under the subcontract? Was plaintiff or the defendant obligated?

A. I'd say in general neither. That is, there is an item for subgrade, reshaping, which work was performed by the Curtis Gravel Company. And in areas where they would perform subgrade reshaping in that sense they would prepare the subgrade. The subgrades primarily were prepared by other contractors; that is, other general contractors, except in the locations where Curtis Gravel Company prepared or placed the roadbed topping. And I presume in those areas we would conclude

(Testimony of L. W. Huncke.)

that he prepared the subgrade to the extent of the roadbed topping.

Q. When was the last of the subgrade ready to have ballast applied to it?

A. I have no knowledge of that. It's in the record, I think.

The Court: Mr. Haessler, may I interrupt?

Mr. Huncke, did your firm actually apply the ballast? [332]

The Witness: Yes, sir.

The Court: You didn't have a subcontract for the letting of that?

The Witness: No.

The Court: Do you know whether or not there are any reports either? I assume that your firm kept a diary on the job. Do you know of your own knowledge whether there are any reports in the diary concerning the experience that you were experiencing as you progressed down the line in applying the ballast? What I have in mind is whether it was meeting your estimate and your original estimates, or was it not?

The Witness: The work—I believe it's been shown here that none of the ballasting work actually commenced until April.

The Court: I see.

The Witness: And that his—now, we are talking about the part—

The Court: I understand.

The Witness: —being on the left bank. So that as regarded the amount of production there

(Testimony of L. W. Huncke.)

would have been no experience up till the time——

The Court: I understand. I just had that one question.

Mr. Keane: If the Court please, may I make a suggestion? I think it might clarify the situation a little bit if Mr. Huncke would tell us just how this contract was to be performed, [333] building of the subgrade, and what came next and what came next and about when it was being done. The sequence of events, I think, have been fragmentary all the way through. That way we can tie what we are talking about into a definite sequence of time just as to what happened.

The Court: If Counsel wants to develop that, he may.

Mr. Ramacciotti: That, I believe, was attempted at the commencement of the testimony of this witness when he went on and on and talked for a considerable time.

Mr. Keane: He had nothing to say about that, Mr. Ramacciotti.

Mr. Ramacciotti: And I made an objection to certain of his remarks because they were not proper. And I think the only possible way of getting at the facts will be by asking him questions and getting answers that are under the Rules of evidence.

The Court: I quite agree.

Mr. Ramacciotti: Therefore, I object to the procedure that has been suggested, if your Honor please.

(Testimony of L. W. Huncke.)

Mr. Haessler: If the Court please, we will withdraw that request and go ahead.

Q. Mr. Huncke, did your general contract call for you to lay track? A. Yes, sir.

Q. This track when laid became the relocated portion of the [334] Southern Pacific, is that correct? A. Yes, sir.

Q. You have testified that the subgrade for this track was prepared by other contractors, the preparation of the subgrade was independent of your contract; is that correct?

A. Not exactly. I said that in general the subgrade was performed under Government contract by other contractors, but in so far as roadway shaping and roadbed topping are concerned or can be considered as a preparation of a subgrade then it was included in our general contract as well as in our subcontract with Curtis.

Q. Was roadbed shaping the first job which would be performed under the contract after you took it over?

A. If required, that would be the first job.

Q. Would roadbed shaping require only part of the subgrade turned over to you? A. Yes, sir.

Q. And on the part where it was required it was performed? Was it performed?

A. It was performed by our subcontractor.

Q. What was the next operation that was performed under your general contract, either by the subcontractor or by others, after the roadbed shaping?

(Testimony of L. W. Huncke.)

A. The next operation was to place the roadbed topping.

Q. What material is used for the roadbed topping? [335]

A. I believe the specifications permitted either the use of river-run gravel or crusher-run stone. It was not a highly selected material.

Q. Did the subcontractor place any of the roadbed topping?

A. He placed all the roadbed topping that was included in our contract, in our general contract.

Q. When was this roadbed topping placed?

A. I can only say generally when it was placed because in my trip to Lookout Point either in August or the 1st of September a portion of it had been placed. And that was one of the things I was complaining about. As to what was placed after my trip to Lookout Point, I don't know.

Q. What is the next step after the placement of the roadbed topping?

A. The next step after the placement of the roadbed topping is to distribute the cross-ties and then the rails and the attachments that permit you to assemble the track itself.

Q. When is the ballast placed on the——

A. The ballast was placed on the completed track.

Q. Well, the ballast was put on after the ties and rails and everything else had been done?

A. After they had been properly hooked up and

(Testimony of L. W. Huncke.)

properly aligned, the ballast is then unloaded and applied to the track.

Q. Is that the last operation under your contract? Except for a variance in the work that is the last operation? [336]

A. Except for various other little work it is the last operation.

Q. Did the amount of ballast required per hundred feet of right-of-way vary substantially on the job?

A. You mean vary as between various locations on the job?

Q. Yes; various locations on the job.

A. I wouldn't be able to say, but I don't think so. I don't know, but I don't think so. [337]

* * * * *

Q. All right. I hand you herewith Defendants' Exhibits 5-A and 5-B. Will you read those, please?

A. This is a paid day letter telegram, Kansas City, Kansas, May 9th, 1952, addressed to Curtis Gravel Company; Spokane, Washington: [342]

"Lookout Point ballast supply exhausted this week. If no other source suggest you contact MKM and local producers for remaining requirements. Advise. William A. Smith Contracting Company, Inc., L. W. Huncke."

Q. Did you receive any reply to that telegram?

A. I don't know.

Mr. Ramacciotti: What's the date of that?

Q. (By Mr. Haessler): What was the date? Will the Bailiff read the date, please?

(Testimony of L. W. Huncke.)

The Witness: May 12th, I think it says.

The Bailiff: May 9th.

Q. (By Mr. Haessler: Will you read the next telegram?

A. It's a paid day letter, Kansas City, Kansas, May 13th, 1952, Curtis Gravel Company; Spokane, Washington:

“Account your failure provide stone ballast Lookout Point relocation conformance terms your sub-contract we have arranged to procure same from commercial sources at your expense. Procurement will commence May Fifteen. Lookout Point Constructors, L. W. Huncke.”

Q. Did you receive any reply to that telegram?

A. Not that I know of. I don't know.

Mr. Haessler: And will you give the witness, please, Plaintiff's Exhibit 4-O. [343]

Q. Will you read that, please?

A. This is a copy of a letter dated at Kansas City May 8th, 1952. Registered mail to Mr. Curtis, Curtis Gravel Company, Box 106, Spokane, Washington:

“Dear Mr. Curtis: In conversation this date with our project manager at the Lookout Point job I was advised of the quantity of ballast which you have manufactured for construction of the relocated tracks which will probably fall short of the requirements by as much as 5,000 yards.

“You will recall in my personal estimates on the quantity of material required there was approximately 64,000 yards. It now appears that sixty-four

(Testimony of L. W. Huncke.)

to sixty-five thousand cubic yards will be required. Both Mr. Thompson and yourself were advised of my personal estimate in the matter as well as being given our theoretical calculations for the quantities required. We, therefore, presume that you have made arrangements either to manufacture the additional requirements or to purchase the materials locally.

“In any event, we desire to be advised of what arrangements you have made to guarantee the amount of material not yet manufactured and in [344] stock pile. Your prompt reply will be appreciated.”

Q. Did you receive any reply to that letter?

A. I don't know.

Q. Where did you get the balance of the ballast required for the job?

A. It was purchased from a commercial source at Springfield, Oregon.

Q. Do you recall the number of yards which was purchased?

A. From Springfield?

Q. Yes.

A. No, I don't.

Mr. Haessler: No further examination. You may cross examine. [345]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Ramacciotti): Now, did you on occasions prior to the filing of the complaint in this court have conversations with Mr. Curtis and with myself and with Mr. Ratcliffe with reference to this matter in litigation? A. Yes, sir.

Q. Did you at any time when those conversa-

(Testimony of L. W. Huncke.)

tions were in progress deny any part or portion of the claim for \$14,582?

A. I don't think I ever was called upon to affirm or deny that. I made many attempts to settle this over the past few years with both yourself, Mr. Ratcliffe and Mr. Curtis. As to [350] a specific sum of money being as to claim denial or affirming of it, I don't recall anything about that.

Q. You don't recall anything about it?

A. I recall that we were offering Mr. Curtis settlements of various sums at various times in which these amounts developed.

Q. Now, to refresh your recollection, may I say to you—let me ask you whether or not you were in Portland on the 15th of November, 1954, and were present in the office of your attorneys in the American Bank Building at about 5:00 o'clock of that day, at which time I came to that office and talked with you?

A. I recall talking to you in this office.

Q. Now, subsequent to that meeting I might say to you, Mr. Huncke, I returned to my office and prepared a complete memo of the conversation thereafter, placing it upon a recorder. Tell me, if you will, whether or not the contents of this memo are correct in this regard. First matter discussed pertained to the \$14,000 claim. As to this item the following statements were made: Lookout Point Constructors do not deny the debt on this item.

A. Do not deny what?

Q. What is that?

A. What is that?

(Testimony of L. W. Huncke.)

Q. Lookout Point Constructors do not deny the debt on this item. Do you recall having stated that you did not deny the [351] debt on this item?

A. I don't wish to be placed in a position of including that as a debt. I do not deny that I offered Mr. Curtis fourteen thousand and substantially more than that.

Q. You are varying from my question, Mr. Huncke.

A. Well, I don't care to answer the question on the basis of a debt.

Q. All right. You do not deny that you were indebted to them at that time by virtue of having received that amount of money from the Corps of Engineers?

Mr. Haessler: If the Court please, I'd like to have that question reread. I don't understand it.

The Court: Read it, please.

(Whereupon Mr. Ramacciotti's last question to the witness was read by the Court Reporter.)

Mr. Haessler: I think the question should be—do you mean does he deny it now, or did he deny that in that conversation?

Mr. Ramacciotti: Well, there is only one fact and that is he either denies it now or then and they are both the same, or they should be.

The Court: Please read the question again.

Mr. Haessler: Please read the question again, what he is being asked to deny. [352]

(Whereupon the question as read in the last

(Testimony of L. W. Huncke.)

parenthetical was again read by the Court Reporter.)

The Witness: I deny I was indebted to him other than for what we had offered to make settlements for.

Q. (By Mr. Ramacciotti): Well, now, the further reference to this claim of four thousand-plus—and I am referring to the memorandum that I have mentioned earlier—appears this language:

“Lookout Point is not disposed to pay any interest on this item, although some \$14,582 has been in the possession of Lookout Point since July of 1953.” Is that a correct statement of what you told me at that time? A. I don't remember.

Q. You have no recollection of it?

A. I don't—do not recollect that.

Q. Do you remember discussing interest?

A. I think you brought the subject up, or it was in a complaint, or something. I remember there was a discussion about interest. I believe you had compiled some thirty-odd thousand dollars of indebtedness in which one of the items was interest.

Q. Do you recall having told me the reason why you would not pay interest on the fourteen thousand dollars from the [353] time that you got the money?

A. I can tell you exactly why I wouldn't be willing to pay interest, and that is because I was ready to settle with Curtis the day that the contract was ended. I have been ready to settle with him many times since. And under those circumstances I felt

(Testimony of L. W. Huncke.)

that I did not owe any interest on any moneys that he might be willing to acquire.

Q. Let me ask whether or not this statement contained in the memorandum is a correct statement of what you told me that night. In view of the fact that Lookout Point Constructors consisted of two separate corporate entities, the moneys collected in July of last year could not be converted into capital for use of said firms without splitting between them of the fund. And since the money belonged to Curtis, it was decided that the same be not divided but same be placed in a commercial account without interest, being merely impounded to await Curtis' decision to settle all claims and take the funds awaiting delivery to him. Is that a correct reflection of what you told me at that time?

A. I don't remember that.

Q. You don't remember it? A. No.

Q. Well, what happened to the money? Was it deposited in a commercial account?

A. I don't know. [354]

Q. Do you remember having discussed that with me?

A. The joint venture was an entity of two corporations and their funds were maintained for a certain period after the contract to clean up indebtedness and, particularly, to settle their dispute with Curtis.

Now, as to whether the funds were kept separately or divided, it wouldn't matter. We had a bond on the job and we were both solvent.

(Testimony of L. W. Huncke.)

Q. But did you not tell me at that time what we are getting at?

A. I don't recall anything about that, Mr. Ramacciotti.

Q. That you didn't split the money because it belonged to Curtis?

A. I don't recall it. It's possible it wasn't split, or it's possible it was split; I do not know.

Q. Is it possible that you told me these things that appear in this memo?

A. Is it possible?

Q. Yes.

A. I would think it would be possible. I don't remember it.

Q. All right. That's all I want on that. Now, Mr. Huncke, will you state, please, whether or not on September 25th, 1952, you as the designated authorized executive of Lookout Point Constructors wrote a letter to the Resident Engineer of the Corps of Engineers of the United States Army with reference to [355] a claim on account the matter of the \$9,871.70 which has been discussed here?

A. I wouldn't remember that.

Q. You don't remember it?

(Whereupon a document was handed to the witness by the Crier.)

Q. By the way, is that dated September 25th?

A. 25th; yes, sir. I wrote this letter.

Mr. Ramacciotti: May I have it back, please?

Q. Then, let me inquire further with reference to this matter and ask whether or not on January

(Testimony of L. W. Huncke.)

19th, 1953, you addressed a second letter to the Corps of Engineers at Portland with regard to same item. May I correct that date? Whether or not Mr. Moore, your office manager in Portland, wrote the letter to the Corps of Engineers with regard to this same item? A. I don't know.

Q. What? A. I presume he did.

Q. Do you know about that?

A. I don't know, Mr. Ramacciotti. It's entirely possible. If that's a copy of it, I am sure he wrote it.

Q. Well, do you know of this subject matter which was included in the letter which is in evidence, Exhibit 2-H—

A. May I look at it?

Q. —to the effect that the claim should be paid by the [356] Corps of Engineers; that is, the nine-thousand-dollar claim, for the reason, among other things, that the stand-by charge for the crusher and equipment of Curtis Gravel at the plant until it was finally determined when—what ballast was actually to be required would run to \$118,380.75? Do you remember that matter?

A. I remember some generalities about that.

Q. Yes. And you used those figures as a means; that is, through Mr. Moore, to convince the Corps of Engineers that they should pay the nine thousand because they avoided the obligation to pay \$118,000 on account stand-by equipment?

A. I don't think we used the figures in that fashion at all.

Q. Well, the exhibit speaks for itself, Mr.

(Testimony of L. W. Huncke.)

Huncke. A. All right.

Q. Now, then, on the 23rd of February do you recall having addressed a letter to the Chief of Engineers of the Corps of Engineers at Washington regarding this matter? Would you like to see the letter? If you do, I will send it up to you. It's Exhibit No. 2-I. And, Likewise, you might look at these two others. That will save time.

(Whereupon the Crier hands the documents to the witness.)

The Witness: I recall writing this. These all have to do with the claim. [357]

Q. That's right. Now, in the letter of February 23rd—which, apparently, carried your signature; isn't that correct? A. Yes.

Q. Let me ask whether or not you made these statements to the Corps of Engineers of the United States Army:

“Ballasting operations did not commence until April, 1952, due to the condition of the completed four and a half miles of railroad subgrade. It is acknowledged that this four and one-half miles of completed subgrade was available for track-laying and ballasting on November 28, 1951.”

Is that a correct statement?

A. I am sure it is.

Q. Was there four and a half miles of track ready for ballast at that time?

A. I don't know. I was not there.

Q. Well, did you say that in the letter?

(Testimony of L. W. Huncke.)

A. If the letter says so, I certainly wrote that letter.

Q. Now, as a matter of fact, you were there sometime in the summer of 1951?

A. That's right.

Q. Isn't it a fact that there were two miles of track ready for ballast in July of 1951?

A. No, I don't think so. [358]

Q. Okeh. Now, if there were—and I think I will establish by your testimony that there was—if there two miles of track ready for ballast in 1951, July, and two more miles or two and a half more miles by November, and had you applied ballast to those four and a half miles, which is more than one-fourth of the 16-mile relocated track, would you have not been able to determine by December of 1951 about what your requirements would be——

A. No, sir.

Q. ——from the experience——

A. No, sir.

Q. ——on account the four and a half miles?

A. No, sir.

Q. You could not? A. No.

Q. Now, the letter of February 23rd—may I ask whether or not you recall having this in mind at the time you wrote this letter of February 23rd:

“I would like to advise you that your statement ‘referring to a statement in letter received by you prior to dismantling your crushing plant on December 22nd, 1951,’ is in error. This crushing plant was in no way dismantled until February 16th, 1952.

(Testimony of L. W. Huncke.)

Although no permission was given to dismantle the crushing [359] plant after February 16th, 1952, the matter was discussed with your Resident Engineer. Inasmuch as the ultimate cost was obviously less, a decision to procure ballast commercially was made. Although there is no record of such approval on this procurement, it was perfectly obvious to all concerned that this procedure should be adopted.”

Was that your reaction and opinion at the time you wrote this letter?

A. I think the discussions referred to were not discussions of mine but discussions of others. And I think they were the discussions of Curtis Gravel Company with the Resident Engineer.

Q. Well, the letter tells who the discussions—

A. Well, I didn't get that out of what you read.

Q. Now, with reference to the letter of March 16th, let me ask whether or not you looked at that letter and it was written by you and the paper that is in evidence is a photostat; isn't that true?

A. I think so.

Q. This language from the letter of the 16th of March:

“Although I have no reason”—referring to yourself— “—have no reason for not having secured your permission to remove this equipment from the job site”—and the letter has to do with the crushing equipment, of course—“at the [360] same time I believe it was self-evident to the Resident Engineer and to us that no one could afford to hold a complete quarrying and crushing plant for an in-

(Testimony of L. W. Huncke.)

definite duration to manufacture an indefinite quantity of material.”

Was that a statement made by you at that time?

A. If it's in that letter, I made it.

Q. Actually, reading on from there:

“Our subcontractor produced a substantial percentage of material over and above the contract requirements. Our calculations indicated that the theoretical quantity of ballast required would not exceed 48,000 yards. The contract quantity was 54,000. I think that was an error. Obviously it included a percentage for compaction and subsistence. We produced, initially, about 60,000 yards, an amount approximately 25 per cent in excess of the theoretical quantity. It is believed that a sound decision was made at the time that the plant was dismantled, and in looking back over the matter I am inclined to believe that we would have followed exactly the same course except that we would have unquestionably presented the matter to you. For this omission I am sorry.”

That was in your mind at the time you wrote this [361] letter?

A. I think it's very clear in the letter that I wrote Curtis Gravel Company that I had no reason to ask them to hold the plant. I stated that quite clearly, that their means of procurement——

Q. You have already answered the question that I have asked you and that is with reference to the contents of the letter I just read to you.

Now, there is another letter that you looked at a

(Testimony of L. W. Huncke.)

moment ago, being Exhibit 2-K, and being a letter photostat dated June 29th, 1953. Did you look it over while you had it in your hands a moment ago?

A. I didn't look at any of them too accurately. But they bear my signature and I wrote them. There is no question about what is in them.

Q. Let me direct your attention to this letter which contains a number of paragraphs. Let me refer to Paragraph C, and I will read from it and ask you whether or not it is written as you had dictated it and as you transmitted it originally:

"Although Contract Item No. 3b 'ballast material' provided for an estimate of 56,000 cubic yards of such material, the theoretical quantity of material required for the construction was slightly less than 48,000 cubic yards. [362] It can reasonably be assumed that the Government in preparing the contract bid items allowed for losses which occur in subsistence and compaction of the ballast material in the gross amount of approximately 8,000 yards or 16 per cent. This is not an unusual variation from the theoretical quantity and the actual quantity used in this type of construction work. The contractor actually placed 71,343 cubic yards, which represents a 27.4-per cent increase over the contract quantity, but a 48.5-per cent increase over the theoretical quantity. It is not reasonable to assume that the contractor would expect an overrun in this theoretical quantity of ballast of 48.5 per cent."

Now, further from that letter, Paragraph D:

"The contractor manufactured and stockpiled

(Testimony of L. W. Huncke.)

48,434 cubic yards of ballast material having the same available for installation on the track in December of 1951. This was an allowance of 21.7 per cent of the possible—for a possible overrun, and the theoretical requirement was 48,000 cubic yards. This was also an allowance of 4.3 per cent over the quantity estimated as being required by the Government.” [363]

Further, with reference to this letter, subparagraph E on Page 2:

“The contractor permitted the subcontractor to dismantle and remove his ballast plant from the site after producing 58,434 cubic yards of material which was in excess of the contract quantity and assumed to be sufficient to perform the work.”

Next, subparagraph F:

“We believe it erroneous to state that the ballast plant was partially dismantled and not operated after December, '51. When 58,434 cubic yards of material was produced, the plant was dismantled for major overhauling and was not—and was at all times until March 6th, 1952, at the site of the work. No part of the plant was removed from the site before February, 1952.”

You were conversant with the true facts at the time you wrote this letter, were you not, Mr. Huncke?

A. The statement you just made was given to me by Curtis Gravel Company and I merely passed it on to the Government.

Q. Didn't you have a superintendent there that made reports to you?

(Testimony of L. W. Huncke.)

A. But that particular——

Q. Can you show any——

Mr. Haessler: I object, your Honor. I think he should [364] be permitted to finish his answer.

Mr. Ramacciotti: I think that's right. I am sorry.

The Witness: I merely stated that the contention of the Government was that the plant had been dismantled in December of 1951. Our superintendent reported that it was removed from the site March 6th. I had not a thing to refute the contention of the Government except by reference to Curtis Gravel Company. They told me that in January they had taken the motors out for overhauling but that their plant, substantially, remained at the site until March 6th.

Q. (By Mr. Ramacciotti): Now, the information contained in this letter, do you attribute all of it to the source that you mentioned, Curtis Gravel, or did it come from your own representative on the job? A. I am talking about this plant.

Q. This one thing.

A. This last thing that you are talking about?

Q. That's all right, then. Did you have any letters from Curtis Gravel advising you with reference to this plant matter, or is that word of mouth?

A. I don't know. I don't remember.

Q. You don't? Now, let me ask you, Mr. Huncke, whether or not—I refer back to the letter of March 16th and particularly this language:

“Actually, our subcontractor produced a [365]

(Testimony of L. W. Huncke.)

substantial percentage of material over and above the contract requirements.”

That is in your letter. That is one signed by you to the Corps of Engineers. What contract requirements were you talking about when you said that Curtis produced an amount over and above the contract requirements?

A. I was talking about the specified quantities in the general contract.

Q. And you wrote this letter in March of '53, after the job was all finished?

A. That's right.

Q. And all extensions of time and such had passed and were gone behind; right?

A. Well, I don't know whether all extensions had been taken care of or not.

Q. Now, let me ask you, Mr. Huncke, whether or not you were present at a hearing before the Claims and Appeals Board of the United States Corps of Engineers, United States Army, on the 10th day of May, 1954, in Portland?

A. I believe I was.

Q. What is that? A. Yes.

Q. Let me ask you, Mr. Huncke, whether or not you recall that a Mr. Comisky, counsel for the Government, in that proceedings made a rather extended statement of what the case and [366] the claim was about? A. I think so.

Q. Would you care to look over the statement of Mr. Comisky, made to the Member of the Board who was there in charge at the time? I would like

(Testimony of L. W. Huncke.)

that you do that. Page 3. It would just entail reading it to yourself; Page 3, 4, 5 and half of 6. [367]

* * * * *

(Discussion held off the record.)

Q. (By Mr. Ramacciotti): May I ask, have you finished that, Mr. Huncke?

A. I don't know how far you want me to read it.

Q. I said the end—to the middle of Page 6.

A. Well, I am just about there.

Q. The end of the remarks of Mr. Comisky.

May I please have it now that he has finished?

Now, Mr. Huncke, you have read to yourself and out loud the remarks of Mr. Comisky starting on Page 3 and extending to the center, approximately, of Page 6 of the transcript, Exhibit 1; correct?

A. Right.

Q. You are nodding your head, and that doesn't get into the record. A. Correct.

Q. Now, after those remarks of Mr. Comisky with reference to the nature of the case, and that is what his remarks had to do with, that is, the nature of the claim; correct? A. That's right.

Q. It is a claim on excess ballast requirements for 9,000-plus?

A. It's a claim on extra cost.

Q. Yes. You were asked by Examiner Buckey of the Board—there was a comment by Examiner Buckey, and then you made [369] this statement, is it not correct, Mr. Huncke:

“Well, the basis of the claim, I think, has been set forth accurately”?

(Testimony of L. W. Huncke.)

Is that correct?

A. I think the basis was there. I don't agree with Mr. Comisky's—all his statements there.

Q. Well, did you say that it was set forth accurately?

A. I think it was set forth accurately.

Mr. Ramacciotti: I am not going through it reading all of this, but the point that I make, if your Honor please, is that this witness, after having heard the remarks of the attorney for the Government, said that the basis of the claim has been set forth accurately by Mr. Comisky.

Q. Now, Mr. Huncke, after the completion date of the original contract, the crushing plant was removed; correct?

A. No, I can't agree with that.

Q. The 16th of February?

A. It was removed after the 16th of February.

Q. That's right. After it was removed, whether with or without your consent and blessing, as some of the letters indicate that you gave,—

A. Yes.

Q. —after it was removed there were further requirements for gravel on this job on the 16 miles, or ballast, rather? A. That's right. [370]

Q. You made known to Curtis Gravel none of these extra demands, did you, extra requirements?

A. You are talking about extras by reason of change orders or such or whether—

Q. For any reason, after the contract proper expired. There were requirements that you did not

(Testimony of L. W. Huncke.)

bring to the attention of Curtis Gravel Company, requirements of ballast?

A. After February 16th—I really don't understand your question.

Q. Well, all right. I'll get to the point a bit more closely. After the plant was dismantled, the railroad,—that is, the Southern Pacific Railroad,—protested about three-quarters of an inch of ballast that they desired added, and that came to 2400-plus yards on the over-all requirements; isn't that true?

A. Now, Mr. Ramacciotti, I'll need to explain a little. I just said, first, that Mr. Comisky made a basis for my claim and I thought the basis was correct. But I do not support him in any of those statements that he has made regarding where this ballast went.

Q. All right. Well, didn't you at one time take issue with this figure, the 3500 extra yards which were required, and state that according to your computation actually 5500 extra on that particular part—

A. What was that part? [371]

Q. —of the job—

A. Well, what was that?

Q. Well, let's get back here. Well, after Curtis had removed or dismantled the Curtis plant, was it decided that three-quarters of an inch average of extra ballast should be placed and was in place along this right-of-way?

A. I have no knowledge of that.

Q. You don't remember?

A. None whatsoever.

(Testimony of L. W. Huncke.)

Q. Do you remember?

A. I contest the point, however.

Q. What is that?

A. I contest that statement by the Government.

Q. Do you remember Mr. Buckey having stated—he was the one in charge of the meeting—as follows:

“You have heard Mr. Drager’s testimony that in spite of this dressing of the grade as it was turned over to the present contractor, that it still hadn’t achieved the final grade in some places?”

“Mr. Comisky: That’s right.

“Examiner Buckey: By about 3,500 yards, as the figures I have figured.

“Mr. Huncke: Fifty-five hundred.

“Mr. Comisky: We dispute on that now. [372]

“Mr. Huncke: I calculated fifty-five.”

Is that correct?

A. I don’t know what you are referring to because the basis the Government was attempting to refute any overrun on this and brought up some ways in which they might account for the differences in this ballast. But we have never agreed to any of them.

Q. And all through those proceedings, as you now, of course, recall, I take it there was a matter of how much ballast was required after the plant was dismantled and there was testimony, principally yours. Without going into the detail here we are getting along pretty late of 5500 extra cubic yards in connection with one requirement, 4200 in

(Testimony of L. W. Huncke.)

connection with another requirement, and another requirement of 680, and another of 560, or a total of in excess of 11,000 cubic yards. From your recollection do you remember that?

A. I absolutely deny that. [373]

* * * * *

Q. (By Mr. Ramacciotti): Mr. Huncke, I observed from the various letters that appear in the Curtis file and in our file that your official capacity for the defendant here was throughout the negotiations and dealings that of authorized executive; is that [387] correct?

A. I believe so. Yes. I had authority to act for both companies.

Q. I didn't hear.

A. I had the authority to act for both companies.

Q. Now, on the matter of this ballast; that's the claim of some nine thousand dollars. May I please see for this question Defendants' Exhibit 4-F? Hr. Huncke, I referred to ballast, and I have before me Defendants' Exhibit 4-F, which was a letter written over your signature to Mr. Thompson of Curtis Gravel Company on December 3rd, 1951. The last two sentences of that letter dealing with the matter of ballast requirements read as follows:

“Under the circumstances it would appear to us that there might be an overrun in the quantity of ballast material required, and this overrun might conceivably approach 10 per cent. I am sorry that we are unable to give you a more definite or accu-

(Testimony of L. W. Huncke.)

rate information, and it is our suggestion that you take off the quantity from the plan and base your production of material on the quantity which you believe to be required.”

Now, as of that date, which was almost two months subsequent to the date set forth in the sub-contract for the [388] stock-piling of the entire 56,000 cubic yards, I take it that you were not able to determine what ballast was required?

A. No, I was not.

Q. At that time—and that was within a couple of weeks, according to the testimony here, prior to the time when the stock-piling was completed—you had no idea as to what would be required?

A. I had an idea about it, but I said there it looked like there would be an overrun.

Q. “Might,” you say?

A. Yes. That’s right.

Q. An overrun might conceivably approach 10 per cent? A. That’s right.

Q. That was what was in your mind at that time?

A. As far as I personally was concerned, that’s correct.

Q. Now, with a 10-per cent overrun that would make the total requirement as you—as per your estimate of December 3rd, 1951, 61,600 cubic yards?

A. (Witness nods head.)

Q. Right?

A. That was approximately my amount.

Q. Fine. Now, then, in connection with that re-

(Testimony of L. W. Huncke.)

quired quantity you, of course, have heard the testimony of Mr. Thompson to the effect that the amount actually produced and put in stock pile approximated 60,000 cubic yards, although there was only loaded [389] in the car somewhat over 58,000; is that correct?

A. Well, I know that he said he stock-piled 60,000 yards.

Q. You have no quarrel with that statement, do you, Mr. Huncke?

A. The only quarrel I would have with that is that we didn't know whether any of the yards would meet the specifications or did we know the quantity.

Q. You didn't endeavor to ascertain the quantity that was in stock pile by measuring?

A. No, we did not.

Q. You did not? A. No. [390]

* * * * *

Q. Now, I think on your direct examination it was your testimony that Mr. Curtis should have known of the ballast need on this 16 miles of track since he did the topping; isn't that true?

Mr. Keane: I wonder, if your Honor please, can the Reporter read that question? [394]

The Court: Yes; please read the question.

(Whereupon Mr. Ramacciotti's last question to the witness was read by the Court Reporter.)

The Witness: I think Curtis was on the ground.

Q. (By Mr. Ramacciotti): Well, now, the question was did you give that testimony some ten days ago at a prior hearing in this case?

(Testimony of L. W. Huncke.)

A. I really don't know whether I said it that way or not. What I had in mind was that Curtis was on the ground and was placing topping on the subgrade. So that he would be familiar with the subgrade.

Q. Well, now, my notes may be in error, but I do have notes to the effect that Curtis should have known as to the requirements of the ballast since he furnished all of the topping.

A. No. No. I did not say all of the topping.

Q. Well, as a matter of fact, to get to the actual fact on that point of topping, he only furnished two miles or a little over two miles of topping on the entire 16-mile project, isn't that correct?

A. No, I don't believe that's correct.

Q. That's not correct? A. No, sir.

Q. Now, had you by October 11th, 1951, determined the amount of ballast required on this job?

A. No, sir.

Q. Did you by that date advise Curtis as to the amount required? A. No, sir.

Q. Did you ever advise Curtis as to the amount required? A. No, sir.

Q. Never did? A. No, sir.

Q. When did you start placing ballast?

A. I believe April 1st or thereabouts.

Q. 1952? A. '52; yes, sir.

Q. What about the matter of the certain two miles of track being available for ballast in July of a prior year?

A. What is it you would like to know about it?

(Testimony of L. W. Huncke.)

Q. What? A. What is the question?

Q. I say, what is the fact as to whether there were two miles of track ready for ballast in July of the year prior? A. That is not a fact.

Q. What is the fact as to whether there were four and a half miles of ballast or approximately that ready for—or track ready for ballast in December of 1951? Yes or No, please.

A. I do not know.

Mr. Haessler: If the Court please, you asked him what is [396] the fact and then you asked him to answer Yes or No. I think that's an inconsistent question.

Q. (By Mr. Ramacciotti): Well, is it true or not, Yes or No?

The Court: The witness said he didn't know.

The Witness: I do not know.

Q. (By Mr. Ramacciotti): Did you have a contract; that is, a subcontract, with Springfield Sand and Gravel Company in connection with this 16 miles of track? A. No, sir.

Q. Did you have a subcontract for ballast on the other side of the river—— A. No, sir.

Q. ——with that firm?

A. No, sir. We had a commercial order.

Q. And did you have just one?

A. We had one commercial order with them for a Part A of the contract, and then we were obliged to go into another order with them for Part B.

Q. Now, let me ask you, Mr. Huncke, whether or not you have, or your firm or any of its representa-

(Testimony of L. W. Huncke.)

tives, to your knowledge, have received a check from the Corps of Engineers in the amount of approximately \$1845 on account adjustment on your claim for extra ballast?

A. We have been offered such a check.

Q. What did that check cover? [397]

A. That check, I believe it was intended to cover the amount which the Government would allow for our ballast claim.

Q. In other words, you have been tendered \$1845 on your claim for ballast, which represented around \$9,000?

A. A little more than that, I believe.

Q. A little more than that? A. Yes.

Q. And you refused it?

A. We have done nothing with it at the moment.

Q. Are you holding the check?

A. I don't know if we are or not. We may be.

Q. You don't know where the check is?

A. Well, I don't know exactly. We may be holding it. We might have sent it back; I am not sure.

Q. That was what was allowed after final hearing in connection with your ballast claim?

A. (Witness nods head.)

Q. Are you still in the process of handling a claim against the Corps of Engineers on account ballast?

A. Well, the claim, as far as the Corps of Engineers is concerned, has ended.

Q. Has what?

A. Has ended. Our prosecution of the claim against them is over with.

(Testimony of L. W. Huncke.)

Q. And you turned, then, the \$1845, either returned the check [398] or not cashed it?

A. That's right.

Q. Now, had you collected that amount of money that should have been moneys of Curtis Gravel Company, isn't that right? Yes or No.

A. I don't believe so.

Q. Whose money would it have been?

A. Lookout Point Constructors'.

Q. Did you ever advise Curtis Gravel of your having received that check for \$1845?

A. No, I don't believe so.

Q. Did you personally ever advise Curtis Gravel that you received a check of \$14,434?

A. I don't believe so.

Q. Now, the reason, as I understand it, Mr. Huncke, that the \$1845 was paid to your firm, or tendered or refused, or whatever the fact is, is that it was a compromise allowance tendered by the Corps for ballast that was required on account new developments which occurred after the dismantling of the plant of Curtis Gravel.

A. I don't know what it was allowed for.

Q. You have sought to find out what it was for?

A. It was their appraisal of our claim.

Q. Don't you know that that is the basis upon which—

A. I don't know what their basis of that money is. It doesn't [399] make sense to me.

Q. You never inquired to find out what the true fact was, did you?

(Testimony of L. W. Huncke.)

A. I reached the limit with the Corps of Engineers.

Mr. Ramacciotti: That's not the question. Would you read the question?

The Witness: Well, then, I didn't inquire further.

Q. What is the fact, Mr. Huncke, as to whether there was any extra ballast used on these 16 miles of track, ballast not contemplated in arriving at the estimated requirement of 56,000?

A. I think the records show that there was some five or six hundred yards of ballast not originally contemplated.

Q. Now, refreshing your recollection, Plaintiffs' Exhibit No. 1 refers to extra ballast used in quantities—may I see that exhibit, please? I don't have the figures here.

How many yards of extra ballast did you say were—

A. About five or six hundred, I believe.

Q. Would the figure 680 cubic yards be the figure you had in mind?

A. That's probably the amount.

Q. What about the 3500 cubic yards that were required?

A. I don't know anything about it.

Q. You were present at the hearing?

A. Yes, sir. [400]

Q. Well, I'll not go into great detail, but can you tell us about the extra twenty-four hundred?

A. I don't know anything about those alleged

(Testimony of L. W. Huncke.)

extras. They are merely contentions of the Corps of Engineers.

Q. What about the 560?

A. I believe the 560 was an established amount to be used for some specific purpose. The 680, whatever it is—500——

Q. Well, do you recall giving any testimony before the Corps of Engineers as to your thought as to what actually was used by way of extra ballast?

A. I don't remember.

Q. You don't recall? A. What is it?

Mr. Haessler: If the Court please, I think this line of questioning is ambiguous and unfair to our client in that I think Counsel must specify by extra ballast whether he means ballast beyond the estimated quantity in the contract or whether he means ballast beyond what we were obligated to furnish under the terms of the contract. I think that's causing confusion to our witness.

The Court: Yes. I can see where it could be confusing.

Q. (By Mr. Ramacciotti): I am referring, Mr. Huncke, to ballast that was not completed at the time of the original contract and that was used——

Mr. Haessler: If the Court please, by "not completed," [401] do you mean not encompassed within the terms of the original contract or not contemplated within the scope of the estimate?

Q. (By Mr. Ramacciotti): Not contemplated as being required?

A. The only amount that I know of is a specific

(Testimony of L. W. Huneke.)

amount of some five or six hundred yards that was added to the contract for a specific purpose. Other than that I think all the ballast used was within the original contract scope.

Q. Well, whatever the amount is—and this record is quite detailed on it and has your testimony in it, which I am not going to indulge in now because of the matter of time—but whatever extra ballast that was not contemplated but was used, let me ask whether or not Curtis Gravel was paid for it or whether they were allowed credit on account your purchases from Springfield Sand and Gravel?

A. I don't know where these extras that you are talking about occurred. It could have occurred out of the 56,000 or 58,000 that Curtis procured for us or they might have procured out of this amount we bought. I don't know where that developed, you see.

Q. You don't know what?

A. I don't know where they developed—this volume of ballast developed.

Q. Now, on September 21st you wrote to Curtis Gravel and stated that within two weeks you would procure a figure as to requirements of ballast. Did you procure a figure in pursuance [402] with that promise made?

A. We made several estimates.

Q. Did you advise Curtis as per the promise in the letter?

A. I don't remember the exact wording of the letter, as to whether it was a promise or an offer. I would like to read the letter.

(Testimony of L. W. Huncke.)

Mr. Ramacciotti: All right. That is exhibit—
Plaintiffs' Exhibit 2-B. May that be presented to
the witness, please?

(Whereupon the document was handed to the
witness by the Crier.)

Mr. Ramacciotti: Read that.

The Witness: Well, I state in here that I am
going to cooperate and help him.

Q. Well, what about the two-weeks matter? Will
you refer to that?

A. There is no commitment here. But I say,
"You will be furnished within two weeks. I will
cooperate and help you all I can."

Q. Did you furnish any figure as to require-
ments within that time? A. No, sir.

Mr. Ramacciotti: May I please see Exhibit 2-F,
Defendants? No. That's Plaintiffs' I am talking
about.

(Whereupon the Crier hands the document
to Mr. Ramacciotti.) [403]

Q. (By Mr. Ramacciotti): Mr. Huncke, as late
as April 14th, 1952, in a letter written by you from
Kansas City to Mr. Thompson of Curtis Gravel
Company which is in evidence, appears this lan-
guage:

"We acknowledge that we intended to advise you
concerning an accurate determination of the amount
of ballast required."

Did you by that date furnish an accurate deter-
mination in accordance with the promise made?

A. No, sir.

(Testimony of L. W. Huncke.)

Q. In that same letter, Mr. Huncke, which is, as I say, in evidence, of April 14th, it appears that you made the suggestion that the Curtis Gravel Company enter into an agreement with the Southern Pacific Company or with the Corps of Engineers for the disposition of any surplus ballast that might be produced; is that correct?

A. That is correct.

Q. Are you acquainted with the fact that the site where the ballast was being procured and the rock crushed was the operation of the Federal Government? A. Yes, sir.

Q. Do you think that Curtis Gravel Company could take Government property and sell it to a railroad or to anyone else?

A. I'd think he could.

Q. You think they could? [404]

A. Yes, sir. I think he could under those circumstances.

Q. Let me ask you this: Assume the production——

A. Not anyone else, but to the Government.

Q. ——of ballast that was actually stock-piled for the purpose of this case which appears to be some 58,000-plus cubic yards and the approximately 12,000 more cubic yards, and let us assume, even more than that, better than, say, seventy-two or three thousand cubic yards, would you or your firms have been able — not able — willing to have paid Curtis Gravel Company for any overrun or over-production?

(Testimony of L. W. Huncke.)

A. We would have paid him under the terms of our subcontract only.

Q. In other words, you would pay only on the basis of what was taken from stock pile?

A. Our subcontract provides that the amount of ballast that we will pay for is the amount determined by the principal.

Q. In other words, what you wanted to buy?

A. Not necessarily. The principal could have bought in a stock pile, I believe. They could have bought it any way they wanted to.

Q. Let me ask whether or not if there had been 5,000 yards of ballast stock-piled that was not required on this job whether your firm was ready and willing to pay for that at the contract price if not used by you?

A. Well, that never occurred to me. [405]

Q. What?

A. The problem has never developed. I mean that's very hypothetical.

Q. Well, maybe it is hypothetical, but this is cross examination. And I will ask whether or not you would have paid Curtis for preparing and stock-piling?

A. We would have paid him under—only under the terms of our subcontract. That's the only way we'd pay him.

Q. In other words, if Curtis Gravel Company had produced more ballast they would have been, you might use the phrase, stuck with it?

A. Oh, I don't think so.

(Testimony of L. W. Huncke.)

Q. If it was more than you wanted to buy?

A. I wouldn't agree with that at all.

Q. But you wouldn't pay for it?

A. We might have paid for it.

Q. Might have? A. Yes. [406]

* * * * *

Q. Just as the stand-by equipment was beyond the scope of the original contract?

A. I don't agree with that at all.

Q. Okeh. Now, at the time that you entered into the original subcontract with Mr. Curtis of Curtis Gravel Company, Mr. Huncke, I think the first discussion about that or the first arrangement before the actual formal subcontract was had verbally about March, is that right, of '51?

A. And possibly even before then.

Q. Then, as I understand, the contract was signed on June 10th of '51?

A. I think it was signed about then. It [412] bears that date, anyway.

Q. Now, on your direct testimony you said that Curtis was furnished a copy of that contract on June 10th when it was signed by both parties.

A. He was furnished a copy of that contract long before June 10th.

Q. Long before. That is, the final contract?

A. Yes, sir.

Q. Final subcontract. Are you sure of that date, that time? A. Quite positive about it.

Mr. Ramacciotti: Would you kindly have that letter marked as an exhibit?

(Testimony of L. W. Huncke.)

The Court: What is the date of the letter, please?

Mr. Ramacciotti: The letter is one dated August 2nd. Isn't that correct?

The Crier: 1951.

Mr. Ramacciotti: 1951.

The Court: Thank you.

Mr. Haessler: Counsel, if you have no objection, may we examine the other letter which you have offered in evidence?

The Court: What is the date of that letter?

Mr. Haessler: The date of this letter, your Honor, is March 29th, 1952.

The Court: Thank you.

(Whereupon a letter dated [413] August 2, 1951, from Lookout Point Constructors to Curtis Gravel Company was thereupon marked for Identification as Plaintiff's Exhibit 21.)

Q. (By Mr. Ramacciotti): Now, Mr. Huncke, you have before you a letter dated August 2nd, 1951, transmitting to Curtis Gravel Company their copy of the agreement of the subcontract under the prime contract here at issue, is that right?

A. That's right.

Q. So that the defendants held up delivery of the contract until August—

A. No.

Q. —as signed? A. No.

Q. That's not true?

A. The contract was presented to Mr. Curtis on or about the 24th day of April for signature. And the contract was then changed and he held the contract for some month or two attempting to get a

(Testimony of L. W. Huncke.)

performance and payment bond and, perhaps, for other reasons that I have no knowledge of.

Q. Well, now, you just testified, though, Mr. Huncke, that the contract copy that belonged to Curtis was delivered to him before June 10th.

A. That's right, April 24th. Not the one that belonged to Curtis, necessarily; the contract. [414]

Q. Well,——

A. I submitted all the contract copies to Mr. Curtis on or about the 24th day of April.

Q. You had a verbal discussion first in Nineteen——

A. No. We had another contract before this contract.

Q. I understand that. But when I am talking about a contract I am talking about the contract that is in issue in this case. Now, you admit that they did not receive the copy of the contract that is at issue in this case until August 2nd.

A. No. They received these contract documents on April 24th.

Q. What about the contract at issue here?

A. The contract at issue was only held by me until I got our performance and payment bond in compliance with the terms of the subcontract agreement.

Q. Mr. Huncke, do you have here available for our inspection any papers that pertain to the purchase or the delivery of the Springfield gravel for ballast?

(Testimony of L. W. Huncke.)

A. I don't know whether we got those papers or not. He can answer that question.

Mr. Ramacciotti: Do you know, Mr. Haessler?

Mr. Haessler: If the Court please, we do have such papers and we intend to offer them in evidence. But we don't have them in the courtroom this morning. [415]

Mr. Ramacciotti: Could you have them here after lunch, please?

Mr. Haessler: We will certainly endeavor to get them.

Mr. Ramacciotti: Will those papers pertain not only to the transaction with the Springfield gravel firm but the railroad charges?

Mr. Haessler: I believe we have papers pertaining to the railroad charges, also.

Mr. Ramacciotti: What about the moving of cars on the relocated main line of the Southern Pacific after Jasper?

The Witness: There is correspondence on that.

The Court: Aren't those amounts covered in the Admitted Statements of Fact?

Mr. Ramacciotti: The amounts are covered, if your Honor please. There is one point I would like to raise with reference to it. We have taken their statement in connection with that, but I am curious as to a certain factor that pertains, that is related.

The Court: All right.

Mr. Haessler: Let me say this: I will produce what records we have. Our records on this Lookout

(Testimony of L. W. Huncke.)

Point job would fill this courtroom. And we have a portion, though, in our law office.

I have looked through some of these. If you want to tell me what it is, I might be able to—— [416]

Mr. Ramacciotti: I would like certain papers and——

Mr. Haessler: Well, I will bring in what papers are available in the office. But I don't want you to feel that we are holding something back because there may be papers that we don't have, of course.

Mr. Ramacciotti: Just before we start this afternoon perhaps I could check them over.

Mr. Haessler: Right.

Mr. Ramacciotti: With the exception of the inspection of these papers, if your Honor please, and, possibly, something more that might develop while Mr. Ratcliffe is searching this file on the date of the contract matter and the date of delivery, we are through with Mr. Huncke.

The Court: You may reopen this afternoon, Redirect?

Mr. Haessler: Yes, your Honor. I don't think we will get too far this morning.

Redirect Examination

Q. (By Mr. Haessler): Mr. Huncke, you have been examined at some length on the circumstances giving rise to the contract. And I am going to ask you to identify certain documents.

First, I would like to have these marked, if you please. This is a letter dated March 12, 1951, from

(Testimony of L. W. Huncke.)

Mr. Huncke to the Curtis Gravel Company. Will you identify that and give [417] it a number, please?

The Clerk: Defendants' Exhibit 21.

(Whereupon a letter dated March 12, 1951, from Mr. Huncke to Curtis Gravel Company was marked for Identification as Defendants' Exhibit 21.)

Mr. Haessler: Here is a letter with attachments from the Curtis Gravel Company to Mr. Huncke dated March 22nd, 1951. That will be No. 22, your Honor.

(Whereupon a letter dated March 22, 1951, from the Curtis Gravel Company to Mr. Huncke was marked for Identification as Defendants' Exhibit 22.)

Mr. Haessler: Here is a letter—telegram dated April 12, 1951, from Mr. Curtis to Mr. Huncke which I ask be marked for Identification as our Exhibit 23.

(Whereupon a telegram dated April 12, 1951, from Mr. Curtis to Mr. Huncke was marked for Identification as Defendants' Exhibit 23.)

Mr. Haessler: Here is a letter dated April 12, 1951, from Mr. Huncke to Curtis Gravel Company which I ask be identified as our Exhibit 24.

(Whereupon a letter dated April 12, 1951, from Mr. Huncke to Curtis Gravel [418] Company was marked for Identification as Defendants' Exhibit 24.)

(Testimony of L. W. Huncke.)

Mr. Haessler: Here is a letter with attachments dated April 15, 1951, from Mr. Curtis to Mr. Huncke, which I ask be identified as our Exhibit 25.

(Whereupon a letter dated April 15, 1951, from Mr. Curtis to Mr. Huncke was marked for Identification as Defendants' Exhibit 25.)

Mr. Haessler: Here is a letter dated April 24, 1951, from Lookout Point Constructors to the Curtis Gravel Company, which I ask be identified as Defendants' Exhibit No. 26.

(Whereupon a letter dated April 24, 1951, from Lookout Point Constructors to Curtis Gravel Company was marked for Identification as Defendants' Exhibit 26.)

Mr. Haessler: Here is a letter dated May 12, 1951, from Mr. Huncke to Curtis Gravel Company which I ask be identified as Defendants' 27.

(Whereupon a letter dated May 12, 1951, from Mr. Huncke to Curtis Gravel Company was marked for Identification as Defendants' Exhibit 27.)

Mr. Ramacciotti: That date, Mr. Haessler? [419]

Mr. Haessler: The date on that is May 12, 1951.

Here is a letter dated May 17, 1951, from Mr. Curtis to Lookout Point Constructors, which I ask be identified as Defendants' Exhibit 28.

(Whereupon a letter dated May 17, 1951, from Mr. Curtis to Lookout Point Constructors was marked for Identification as Defendants' Exhibit 28.)

(Testimony of L. W. Huncke.)

Mr. Haessler: And here is a letter dated May 29, 1951, from Mr. Huncke to Mr. Curtis, which I ask be identified as Defendants' Exhibit No. 29.

(Whereupon a letter dated May 29, 1951, from Mr. Huncke to Mr. Curtis was marked for Identification as Defendants' Exhibit 29.)

Mr. Haessler: Will the Crier please hand this exhibit to the witness?

(Whereupon the Crier does as requested.)

Q. (By Mr. Haessler): I have asked the Bailiff to hand you the document which has been offered—rather, which has been identified as Defendants' Exhibit 21. Will you examine that letter, please, Mr. Huncke?

A. Yes, sir.

Q. Will you read it, please?

A. To the Curtis Gravel Company of Spokane, Washington. It says: [420]

“Gentlemen: You are invited to bid on certain portions of the work under contract Civeng-35-026-51-126 for Relocation Southern Pacific Railway in the vicinity of Lowell, Oregon. The work which we are inviting you to bid on is described in the attached specifications and is the entire work or a part of the work contracted for by us with the Corps of Engineers, Portland District, under the above designated Contract Items 2A, 3A, 2B, 3B, 1C, 2C, 3C and 4C.

“You are invited to quote promptly on this basis, or if you desire an alternate basis which you should describe so that we can appraise your bid.

“Please send bids to us at the Portland office.

(Testimony of L. W. Huncke.)

“Yours very truly, Lookout Point Constructors,
L. W. Huncke.”

Mr. Haessler: Are you willing to stipulate to the introduction of that letter?

Mr. Ramacciotti: I have no objection. It is immaterial.

Mr. Haessler: I'd like to offer that, if you please, Exhibit 21.

The Court: It will be received. [421]

(Whereupon letter dated March 18, 1951, from Lookout Point Constructors to Curtis Gravel Company, previously marked for Identification as Defendants' Exhibit 21-A, was thereupon received in evidence.)

Mr. Haessler: Would you please, Mr. Crier, hand that to the witness?

(Whereupon the document requested was handed to the witness.)

Q. (By Mr. Haessler): Mr. Huncke, the Bailiff has handed you a document which has been identified as Defendants' Exhibit 22. Without reading it—it is lengthy—would you please state—could you summarize or state what the document is?

A. Well, the document is a response to the letter I have just read from Mr. Curtis to Lookout Point covering the items in the contract which we desired the subcontract and are his bids for that work.

Mr. Haessler: Do you have any objection to it?

Mr. Ramacciotti: I have no objection, but I feel it is immaterial.

The Court: It will be received.

(Testimony of L. W. Huncke.)

(Whereupon a letter from Curtis Gravel Company to Mr. L. W. Huncke, dated March 22, 1951, with seven pages [422] attached, previously marked for Identification as Defendants' Exhibit 22, was thereupon received in evidence.)

Mr. Haessler: Next I would like the Crier to hand this to the witness.

Mr. Ramacciotti: What about 23?

Mr. Haessler: Yes. I am going to offer 23, but I want to offer these others first.

Q. Mr. Huncke, you have been offered a document which has been identified as Defendants' Exhibit 24. Will you read it, please, and give the date?

A. The date is April 12, 1951. Addressed to Curtis Gravel Company at Spokane:

"Enclosed herewith is the original and one (1) copy of sub-contract agreement which we propose to enter into with your company for a portion of the work involved in the construction of approximately 16 miles of track on Southern Pacific Company's relocated main line near Lowell, Oregon, under contract between this company and the Government.

"Please carefully read this sub-contract agreement. If the agreement as drawn conforms with your offer and you take no exception thereto, kindly execute both copies and return same promptly to this office. Also, forward to this office a [423] performance and payment bond in the amount set out in the contract. Upon review of the bond and the

(Testimony of L. W. Huncke.)

executed documents, we will, if in order, execute this agreement, returning one copy to your company.

“Commencement of work under Part A, Item 2A, is required at once. Completion of this work is required by May 1, 1951. Your assurance that such work as is required under this item will be performed in its entirety by May 1, 1951, will be appreciated. Yours very truly, Lookout Point Constructors, by L. W. Huncke, Authorized Executive.”

Mr. Haessler: Do you have any objection to that?

Mr. Ramacciotti: No.

Mr. Haessler: We would like to have that—we hereby offer and would like to have that marked as Defendants’ Exhibit 24. The one in the witness’ hand is Exhibit 24.

(Whereupon a letter dated April 12, 1951, from Lookout Point Constructors to Curtis Gravel Company, previously marked for Identification as Defendants’ Exhibit 24, was thereupon received in evidence.)

Mr. Haessler: Now, if you will give that [424] to the witness, Mr. Crier, please.

(Whereupon the Crier handed a document to the witness.)

The Witness: Thank you.

Q. (By Mr. Haessler): You have handed a document which has been identified as Defendants’

(Testimony of L. W. Huncke.)

Exhibit 25. Without reading the document and attachments, would you state what it is, please?

A. Well, the document is addressed to me at Kansas City. It's signed by Mr. G. Curtis, dated the 15th of April, 1951. It's referring to the Government contract at Lowell. It confirms a telephone conversation which Mr. Curtis and I had on that date. In this letter it takes exception to several items and conditions of the subcontract proposal which we had mailed to Mr. Curtis; particularly, as to the time limit of Part A and as to our failure to incorporate unit prices under Part C in the contract documents.

It adds at the end, "With the two copies of Amended Contract to be returned to us for execution we would appreciate two additional copies for job use."

Mr. Haessler: I would like to offer that as our Exhibit 25, Counsel.

Mr. Ramacciotti: No objection.

The Court: It will be received. [425]

(Whereupon a letter dated April 15, 1951, from M. G. Curtis to L. W. Huncke, previously marked for Identification as Defendants' Exhibit 25, was thereupon received in evidence.)

* * * * *

Q. (By Mr. Haessler): Mr. Huncke, I am handing you herewith a document that has been identified as Defendant's Exhibit 26. [430] It's a very short letter. Will you read it, please?

(Testimony of L. W. Huncke.)

A. To the Curtis Gravel Company at Spokane, Washington:

“Gentlemen: We enclose herewith original and one copy of Contract Agreement for work to be performed on the relocation of the Southern Pacific near Lowell, Oregon.

“The changes requested by you have been made on this Agreement, and I am sure you will find it in order. If so, please sign both Agreements, and return them to this office for Mr. Huncke’s signature. One copy will then be returned to you for your file.

“Yours very truly, Lookout Point Constructors, by J. F. McDowell.”

Q. What was the date of that letter, again?

A. April 24th.

Mr. Haessler: Thank you. Do you have any objection to its admission, Counsel?

Mr. Ramacciotti: No. And I might say in order to save time that we will stipulate that your No. 27, 28, 29, may be received without objection.

Mr. Haessler: All right.

The Court: They will be received. [431]

* * * * *

Q. (By Mr. Haessler): Now, Mr. Huncke, you testified on cross examination that you sent the contracts to Mr. Curtis in April and they were returned? A. Yes.

Q. And that you then made changes in accordance with requests which are set forth in one of these exhibits and then returned the contracts back

(Testimony of L. W. Huncke.)

to Mr. Curtis along with the letter of transmittal and Exhibit 26? A. Yes.

Q. Do you know whether or not there were any further changes [434] in the terms of the subcontract from the language set forth in the document you returned to him in April and the document which was ultimately signed by Mr. Curtis in August?

A. There were no changes in the contract agreement as submitted to him on the 24th of April.

Q. All right. I now ask you to read a very brief letter, Exhibit 27, which I am handing up to the Crier—through the Crier. Read it aloud, if you would, please.

A. Dated May 12th, 1951, to the Curtis Gravel Company of Spokane, Washington:

“Some time ago we submitted to you subcontract forms for work on Lookout Point Dam Relocation. At the same time we requested that you execute these agreements if you found same to be in order and return together with Performance and Payment Bonds to this office.

“To date these agreements and bonds have not been received. Will you kindly forward promptly.

“Yours very truly, Lookout Point Constructors, by L. W. Huncke.”

Q. I am now going to ask you to just read the last paragraph of Exhibit 28, which I am handing up to you, and then I will ask you a question on that. Read that aloud, also.

A. This is a letter dated May 17th, 1951, from

(Testimony of L. W. Huncke.)

Curtis Gravel [435] Company to Lookout Point Constructors. The last paragraph states:

“In regard to Performance and Payment Bonds, we are not in a position at this time to forward this to you. We have just very recently changed our bonding company and they now request that we furnish them with financial statement to date. Further, our accountant and office manager, Mr. Farber suddenly left our employ two weeks ago, and it will require at least two weeks to bring our books up to the current date. We therefore request that you allow us this amount of time in which to get the Performance and Payment Bonds to you. We will do everything possible in order to speed this matter along.

“Very truly yours, Curtis Gravel Company,
M. G. Curtis, General Manager.”

Q. Was your company ready and willing and able to execute the subcontract at any time in the latter part of April or May? A. Yes, sir.

Q. Do you know of any reason which delayed the execution of the contractor other than the subcontractor's inability to get a performance bond?

A. I know of no reason for the delay. [436]

Q. All right. You were asked this morning on the question of whether or not your organization had received a check from the Army Engineers in connection with a ballast claim. Do you know whether in fact you ever received such a check?

A. I have checked since leaving the courtroom

(Testimony of L. W. Huncke.)

this morning with our office in Kansas City, and I find that we were never sent a check.

Mr. Ramacciotti: Which check is that?

Mr. Haessler: That relates to the \$1800 in connection with the——

Mr. Ramacciotti: The \$1800.

Q. (By Mr. Haessler): You testified this morning in response to a question on cross examination that the amount of the ballast you would purchase from Mr. Curtis from stock pile would be an amount determined by the principal. Whom did you mean by the word "principal"?

A. The United States Government, Corps of Engineers.

Q. Then the determination as to the ballast requirements would not be made by your company but would be made by the Government; is that correct?

A. Yes.

Q. You were asked on cross examination this morning whether you ever advised Curtis Gravel Company of the exact amount of ballast which would be required to complete the job. Is it not the fact that you sent them telegrams and also at the [437] time their stock pile ran out advising them that additional gravel—ballast would be required?

A. Yes, sir.

Q. Did you ever receive any reply to those requests? A. No, sir.

Q. You were asked on cross examination last week by Mr. Ramacciotti to answer some rather lengthy hypothetical questions based on notes which

(Testimony of L. W. Huncke.)

he talked of an alleged compromise meeting in which you allegedly agreed to turn over \$14,000 by way of compromise and settlement to the plaintiffs. I ask you whether your understanding of that meeting was that you would turn it over unilaterally or that there were conditions under which that transfer was being made?

A. There were conditions attached to the transfer.

Q. What were those conditions, please?

A. The conditions were that we would receive a release and indemnification.

Mr. Ramacciotti: I am sorry; I didn't catch that answer.

The Witness: That we would receive a release and indemnification.

Mr. Haessler: What do you mean by an "indemnification"?

A. I mean that should the funds which we were paid by the Government in regard to any work performed by us for Curtis be not substantiated by the Corps of Engineers or by the general accounting office, that Curtis would indemnify us [438] accordingly.

Q. Was there a possibility at that time that this \$14,000 might be — let me rephrase the question, please. Was there a possibility at that time that the \$59,000 embodied in that Change Order 23 which includes the \$14,000-odd claimed by the plaintiff might be withdrawn from you in all or in part?

A. Well, any money that we received under the

(Testimony of L. W. Huncke.)

contract would be subject to audit by the General Accounting Office and we would not have a clearance on any funds received under the contract until such time as there was a clearance.

Q. Have you received such clearance to date?

A. Our contract is not closed.

Q. I take it your answer is No? A. No.

Q. Then there is still a question as to whether or not you will, in fact, receive any sums under that change order or other change orders?

A. There is a possibility that the audit may change the amount that we are paid under the contract.

Q. Do you know whether or not the Curtis Gravel Company in fact sold some ballast which they had manufactured from the Government stock pile to private sources?

A. I believe they did.

Q. Were those sales made at your direction?

A. No. [439]

Q. Now, it has been the contention of plaintiffs that you handled, you processed the claims which included this \$14,000 item for stand-by rental on their behalf; is that the fact?

A. No, it is not a fact.

Q. Did you incur any expense in prosecuting these claims?

A. We incurred substantial expense in prosecuting all claims on the Lookout Point job.

Q. Did the Curtis people ever offer to pay you

(Testimony of L. W. Huncke.)

for the expenses involved in prosecuting any of these claims? A. No.

Q. Did they ever give you an understanding that you might be—let me rephrase that question. Did they ever give you an understanding that you could deduct a considerable expense of processing these claims inasmuch as you were allegedly processing them on their behalf? A. No.

Q. Now, you were asked about the presentation of various claims this morning, Mr. Huncke. Did you personally process claims handled on the Lookout Point job? A. No, I did not.

Q. Who handled the processing of such claims?

A. Our office in Portland. Lookout Point office handled those. [440]

* * * * *

Recross Examination

Q. (By Mr. Ramacciotti): Did you ever at any time, Mr. Huncke, call upon the plaintiff to give you any indemnification on other extra items that were paid to the plaintiff by you and received by you from the Corps of Engineers?

A. I never settled my contract with Mr. Curtis so that I would put the entire thing in one indemnification.

Q. But you paid the money over on the other excess without [442] calling upon—

A. Partially. I paid only partial payment to Mr. Curtis.

Q. What is that?

(Testimony of L. W. Huncke.)

A. I paid Mr. Curtis only partial payment as the progress progressed.

Q. On the extras?

A. I didn't have any extras. On the contract that I had with Curtis I paid progressively partial payment estimates.

Q. How much do you owe Curtis now?

A. I believe that as of now we owe him nothing.

Q. Now, in your direct testimony, Mr. Huncke, I believe on your direct examination on the 1st— or cross examination on the 1st of the month; that is, February 1st, you stated in substance that you, on the occasion when you talked with me at the office of your attorney, offered the \$14,000 item and considerable more in settlement. Did you at that time consider that you owed \$14,000 and considerably more to Curtis Gravel?

A. No. I was attempting to settle with Curtis Gravel Company.

Q. Did you make any mention at that time with reference to the matter of your being indemnified or taking some kind of an indemnifying release?

A. Oh, yes. Always.

Q. You did?

A. Always a release with an indemnification.

Q. Well, naturally in case of settlement. But I am talking about an indemnifying agreement.

A. Any release that I would draw in this instance would contain an indemnifying agreement.

Q. Did you ever bill Curtis Gravel Company

(Testimony of L. W. Huncke.)

for the expense incurred in processing this claim that we were just talking about, the \$14,000?

A. No, sir.

Q. So that if you never billed Curtis in connection with this expense there was no occasion for him offering you repayment because he had no possible means of knowing what expense might have been incurred; isn't that true?

A. I don't understand the question.

Mr. Ramacciotti: Read the question, please.

(Whereupon Mr. Ramacciotti's last question to the witness was read by the Court Reporter.)

The Witness: I just wouldn't know how to answer that question.

Q. (By Mr. Ramacciotti): What?

A. I wouldn't know how to answer that question.

Q. In other words, you have no answer?

A. I have no answer.

Q. Now, your handling of these claims; that is, such as the one for \$14,000, against the Corps of Engineers was [444] routed through your Portland office?

A. All the claims were handled in Portland.

Q. And that office was in charge of a Mr. Moore?

A. That's right.

Q. That office was regularly conducted in Portland for the handling of matters relative to dealings with the Corps of Engineers?

(Testimony of L. W. Huncke.)

A. It was set up to handle the Lookout Point job and its existence beyond the completion date was for the processing of claims.

Q. Now, you have maintained here that there has been expense in connection with the processing of this claim of \$14,000. Isn't it a fact that Curtis Gravel furnished two separate statements as to the basis of that claim?

A. They furnished substantial information.

Q. And that information was simply turned over to the Corps of Engineers?

A. No, sir; I don't believe that's true.

Q. What is that?

A. I don't believe that's true.

Q. And you were paid exactly on the basis of the claim as presented by Curtis Gravel to Lookout Point Constructors?

A. I don't think that's true. [445]

* * * * *

[Endorsed]: Filed November 18, 1957.

[Endorsed]: No. 15828. United States Court of Appeals for the Ninth Circuit. Wm. A. Smith Contracting Co., Inc., a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants, vs. Marland Curtis, Lyman Curtis, Glen C. Curtis and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 16, 1957.

Docketed: December 23, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15828

WM. A. SMITH CONTRACTING CO., INC., of
Missouri, a corporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS, and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Appellees.

ADOPTION OF RECORD ON APPEAL AND
STATEMENT OF POINTS ON APPEAL

Appellants hereby adopt the "Designation of
Contents of Record on Appeal" and "Statement of
Points on Appeal" filed in the United States Dis-
trict Court for the District of Oregon in the within
cause.

KEANE AND HAESSLER,
/s/ GORDON H. KEANE,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 23, 1957. Paul P.
O'Brien, Clerk.

United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLEES

*Upon Appeal from the United States District Court
for the District of Oregon*

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MAY 26 1958

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WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

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MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLEES

*Upon Appeal from the United States District Court
for the District of Oregon*

STATEMENT OF THE CASE

Appellant entered into a contract with the United States of America, acting by and through the Corps of Engineers of the United States Army, hereinafter referred to as the Corps of Engineers, on or about January 31, 1951, whereby appellant undertook to construct a portion of the re-located railroad track of the Southern

Pacific Railroad near Lookout Point Dam in Lane County, Oregon. (Def. Ex. 1).

By Contract dated June 10, 1951, a portion of this work was sub-contracted to Appellee, (Def. Ex. 2). The said sub-contract provided in part that Appellee was to produce in stockpile the ballast material referred to in Part B, Item 3b, of the prime contract. The completion date for this portion of the sub-let work was fixed by the sub-contract as October 15, 1951.

Prior to the completion date of October 15, 1951 for the work referred to above, and in compliance with the custom of the trade, and the understanding of these parties, Appellee requested advice as to the quantity of ballast material that should be stockpiled. Appellant promised a prompt determination but subsequently advised Appellee that such determination was not to be forthcoming. Appellee produced and put in stockpile approximately 4,000 cubic yards of ballast material in excess of the estimated quantity, and thereafter dismantled their crushing plant.

Sundry modifications and changes were made in the prime contract, and ultimately it was found that Appellant was required to purchase from other sources 12,837.07 cubic yards of ballast material for completion of their obligation to the Corps of Engineers. The Appellant claimed that the sum of \$9,872.70 represented the excess cost of this quantity of ballast material over the

cost they would have paid Appellee for the same quantity under the terms of the sub-contract, and Appellant withheld this sum from payments owing to Appellee on account the ballast material produced and furnished by Appellee to Appellant.

In addition, Appellee furnished labor and equipment in excess of that contemplated by the prime contract. A claim for this "extra" was submitted by Appellee to Appellant for further submission to the Corps of Engineers. The total of claims so submitted by Appellee was in the sum of \$17,085.28, of which sum \$14,582.92 was approved by the Corps of Engineers and remittance in said amount was thereafter made to Appellant on or about April 1, 1953.

Demand was made by Appellee for the payment of the sums aforesaid, to-wit, \$9,872.70 and \$14,582.92, and failing to receive payment thereof this action was instituted.

STATEMENT OF POINTS TO BE URGED:

1. The sub-contract of June 10, 1951 (Def. Ex. 2) determines the obligations of these parties relating to the manufacture of ballast material.
2. Only a part of the prime contract (Def. Ex. 1) was sub-contracted to Appellee.
3. The prime contract was modified, extended, and altered subsequent to the date of execution of the sub-

contract, all without the participation or knowledge of Appellee.

4. The custom of the trade imposes an obligation on Appellant to advise Appellee of the quantity of ballast material to be stockpiled.

5. The parties understood the sub-contract agreement as requiring Appellant to advise Appellee of quantity of ballast material to be stockpiled.

6. Interest is allowable at the rate of 6% per annum from April 1, 1953 until paid on the sum of \$13,707.-94, and from December 17, 1952, until paid upon the sum of \$9,867.87.

SUMMARY OF ARGUMENT

The sub-contract did impose upon Appellee the obligation to furnish more or less than the estimated quantity of ballast material designated therein, but this obligation was dependent upon being advised prior to the completion date of this facet of the sub-contract the quantity which would be required. The Appellee is not bound to produce ballast material to be used in conjunction with construction not contemplated or provided for in the sub-contract of these parties or in the prime contract as the same existed at the time the sub-contract was executed.

The parties expressed their mutual understanding of Appellant's obligation to advise Appellee of the required

quantity of ballast to be stockpiled prior to the drafting of the sub-contract, and this understanding was affirmed by Appellant during the period of manufacture of ballast material.

The custom and usage of the trade imposes upon the Appellant the obligation of advising Appellee of the quantity of Ballast material required to be stockpiled.

Appellant after retention of the claimed extra cost of procuring ballast material from Appellee, proceeded to assert and process a claim for this amount to the Corps of Engineers for their own benefit.

The amounts in controversy represent sums certain which Appellant has wrongfully retained from Appellee's possession.

ARGUMENT

I. Appellant was required to advise Appellee of quantity of ballast material to be stockpiled.

a. Sub-Contract is to be distinguished from the Prime Contract.

The Sub-Contract agreement of these parties (Def. Ex. 2) as the same relates to the matter of ballast material, differs materially from the prime contract entered into by Appellant and the Corps of Engineers (Def. Ex. 1). It is to be noted that the Sub-contract provides expressly that "The sub-let work is to include a *part* of Part B, Item 3b, Ballast Material" (Page 2,

Defs. Ex. 2). This language cannot be expanded to include the entire prime contract or even all of Part B, Item 3b. The distinction between the documents is well illustrated in comparison of the provisions of the Sub-contract requiring a stockpile of the ballast material by a specified date, and the total absence of such provisions in the prime contract.

The Appellant did not assign to Appellee a portion, or part, of their prime contract but, rather, a new and independent contract was executed by these parties, relating to certain work which the prime contract imposed upon Appellant. The terms, specifications, and drawings attending the prime contract were referred to in the sub-contract, but by no means can it be implied that Appellee was bound by all the terms and provisions thereof, particularly as said terms related to matters extraneous to Appellee's specific jobs.

The prime contract makes provision for a completed structure, whereas the sub-contract contemplates the letting to Appellee of certain designated steps required by Appellant in completing the structure. The sub-contract defines the obligations of Appellee, and resort to the prime contract is only incidental as a guide or aid in defining the type, quality or manner of service or material required. For illustration, the stockpiling of ballast material is neither required nor contemplated in the prime contract, and in conjunction with this facet of the sub-contract the terms and provisions of the prime contract are only germane as they designate the quality of ballast to be used.

The Appellant was obligated to place the ballast material (R. 57 and R. 148) and by virtue of Appellant's subsequent modifications and alterations of the terms of the prime contract, (Page 4 Pl. Ex. 1, Page 11 Pl. Ex. 1, Page 12 Pl. Ex. 1), and the unavailability of road bed, (R-86) this operation was not started by Appellants until long after the completion date specified in the sub-contract for the stockpiling of ballast material. It is now Appellant's contention that this sub-contract was a "requirements contract" requiring Appellee to produce in stockpile by a date certain all the requirements of ballast material that Appellant might order over a period in the future to be determined only by the agreement of other parties, to-wit, Appellant and the Corps of Engineers.

To determine the rights of these parties resort must first be had to the sub-contract and then, and only then, to those portions of the prime contract which are referable to the sub-contract. We cannot say that merely because two contracts were in existence that Appellee is bound by all the terms, conditions and subsequent modifications of the contract to which they were not parties.

In the case of *Cruthers et al vs. Donahue*, 85 Conn. 629; 84 At 1. 322, it is said that "the specifications serve the purpose of explaining and amplifying the

provisions of the contract to which they refer. In fact, they show what the contract really was. They speak to the contract as it is; they cannot add to its terms unless the intent, as manifested in the contract, so to do, is clear." The Court made reference to *Moreing vs. Weber*, 3 Cal. App. 14, 20; 84 Pac. 220, wherein the Court said, "The rule seems so well established that it may be said to be elementary that where, in a contract, reference is made to another writing for a particular specified purpose, such other writing becomes a part of the contract for such specified purpose only, and, therefore, this writing, known as the 'specifications' can serve no other purpose than to furnish the plan and specifications as to how the grading should be done, and is foreign to the contract for all other purposes."

The cited case is annotated in Ann. Cas. 1913C, page 224.

It is stated in 9 Am. Jur. 11, that "Where, however, these plans and specifications are referred to in the contract for a particular specified purpose, such specifications can serve no other purpose than the one specified, and are foreign to the contract for all other purposes. In the absence of express provision in the contract, the specifications can neither restrict nor extend the scope of the contract to subjects other than those covered by the contract."

An application of the foregoing rules reveals that in the instant case the sub-contract as it pertained to

the stockpiling of ballast material cannot rely upon the terms and provisions of the prime contract other than as the specifications set forth the quality of material to be produced. The distinctions existing in conjunction with the stockpiling of ballast material as provided for in the sub-contract and the complete absence of such provisions in the prime contract wholly refute any contention that the prime contract is determinative of the agreement of these parties in conjunction with the manner of stockpiling, the time within which the same should be completed, or the respective obligations of the parties with reference to which shall determine the quantity to be stockpiled. It follows that resort must be had to the agreement and understanding of the parties with reference to the obligation to determine the quantity.

b. Understanding of the parties and usage and custom of the trade.

The transcript is replete with testimony regarding the understanding of the parties regarding Appellant's obligation to advise their requirements of ballast material prior to Appellee's completion date for this portion of the work. A meeting had in Pasco, Wn. on or about April 1, 1951, (R-56, 98, 110) concerns a discussion had between Marland Curtis, one of Appellees, and Mr. L. W. Huncke, of Appellants. Also present at this meeting was Mr. D. E. Thompson. At that time the parties made reference to the Appellant's obligation in this regard and the testimony and evidence relating to this conversation

clearly establishes the understanding of these parties with reference to Appellant's obligation. Subsequently, on September 21, 1951, Appellant reaffirmed this understanding of their obligation to advise us of the final quantity of ballast material by letter (Pl. Ex. 2B) wherein Appellee is advised that Appellant would furnish this determination of the requirements for their work "within the next two weeks."

As late as March 14, 1952, Appellant was still satisfied with the stockpiling efforts of Appellee as witnessed by Appellant's letter of March 14, 1952 (Pl. Ex. 2D) wherein it is stated that the quantity of ballast might be insufficient "should the Corps of Engineers reject any considerable quantity of the material". The record will show that none of the ballast material placed in stockpile by Appellee was, in fact, rejected by the Corps of Engineers.

The custom and usage of the trade in conjunction with the contractual obligations of the respective parties in circumstances similar to those posed in the instant case were well established by the expert witnesses called (R-77, 78, 81, 82, 50, 109). The sub-contract agreement in question, by virtue of Appellant's claim, is subject to ambiguity and uncertainty regarding which party shall be obligated to determine Appellant's requirements of ballast material. The face of the sub-contract agreement imposes the obligation to stockpile by a date certain the ballast material which Appellant shall re-

quire. It must be borne in mind that Appellant's requirements were not to be determined until some date after the expiration of the stockpiling of the ballast material; therefore, the written contract is silent as to which party must bear the burden of making this determination of requirements. By virtue of the usage and custom of the trade, the testimony establishes that this obligation is upon the purchaser. It is stated in 55 Am. Jur. 287 (Usages and Customs Sec 27) that "such usage or custom is to be given effect as one of the terms of the contract and is binding on the parties as though it were written. The broad general rule is that proof of a valid usage or custom is admissible to annex incidents to a written instrument, and to aid in its construction, and to ascertain the intention of the parties in reference to matters about which the contract is silent, provided such usage or custom is not contradictory of or inconsistent with the plain terms of a written agreement and its effect is not to add or to engraft any new agreement or stipulation thereon." In the instant case it is apparent that nothing new or inconsistent is being determined by application of both the understanding of these parties and the custom and usage of the trade as the same is applied to the language of the sub-contract agreement.

While it is conceded that the understanding of one of the parties to an agreement does not determine the intent of the parties, in the instant case the evidence establishes that it was the understanding of both parties that Appellant was obligated to advise Appellee of the quantity of ballast material required prior to the date

upon which this ballast material was to be placed in stockpile. It is stated in 12 Am. Jur. 753 (Contracts § 231), "While under some circumstances the understanding of a party to an agreement is of some importance in interpreting it, what one party to an agreement understands or believes does not ordinarily govern its construction, unless such understanding or belief was induced by the conduct or declaration of the other party or was known to the other party. The language of a promisor is to be interpreted in the sense in which he knew or in which he had reason to suppose it was understood by the promisee."

As a practical matter, it is apparent that in viewing the relationship of these parties at the time the sub-contract was executed, it was essential that Appellee have some knowledge of how long he would be required to maintain his crushing equipment at the site for the purposes of manufacturing the ballast material to be put in stockpile. His bid was not based upon the whim or caprice of Appellant. It is to be noted that the cost of maintaining the crushing equipment at the site approximates \$15,785.00 per month (Pl. Ex. 2H). From this fact it is apparent that Appellee was contracting on the basis of a firm completion date for this facet of the contract. The fact that the parties entered into a new and separate agreement, wholly independent of the prime contract, to-wit: an agreement requiring a *stockpiling* of ballast material, imports that both parties were cognizant of the requirement for a completion date so that the rock crushing equipment

could thereafter be removed. The only reasonable interpretation of this portion of the sub-contract agreement imposes upon Appellant the obligation to advise Appellee of the requirements. It is inconceivable that Appellee could be charged with the duty of determining the "requirements" of the other party.

c. Appellant's Appeal to the Claims and Appeals Board.

It is undisputed in the record that Appellant's submitted a claim, on their own behalf, to the Claims and Appeals Board, seeking to recover from the Corps of Engineers their claimed extra cost of procuring ballast. This is the precise matter now in issue. Appellant has retained from Appellee this "extra cost of procuring ballast", and thereafter, and upon their own initiative, endeavored to recover again from the Corps of Engineers. If Appellant's position in this case were tenable, then obviously Appellant had sustained no damage and would not be entitled to any recovery from the Corps of Engineers. It is further to be noted that Appellant was allowed a recovery of \$1,845.00 in conjunction with this very claim (R-178). Appellant did not tender said recovery to Appellee nor did Appellant even advise Appellee of receipt thereof. It was established in the record (Pl. Ex. 1) that during the course of construction, and long after the execution date of Appellee's sub-contract, that certain additional ballast material would be required. It is further established that this fact was not made known to Appellee prior to the dismantling of

Appellee's crushing plant.

In conjunction with claims to the Corps of Engineers, Appellee has remained at all times consistent. The record establishes and Appellants admit on page 4 of their brief that Appellee submitted to Appellant for further submission to the Corps of Engineers claims representing "extras" totaling over \$17,000.00. The Corps of Engineers approved from these claims a lesser sum of \$14,582.92. It is not Appellee's contention that Appellant is liable for the additional sums not allowed by the Corps of Engineers. The Appellees did not submit for processing to the Corps of Engineers their claim in conjunction with the "extra cost of procuring ballast" claimed by Appellant. This item was a charge deducted by Appellant from sums owing to Appellee, and Appellee's demand was always directed solely to Appellant.

d. Analysis of Appellant's claim for "extra cost of procuring ballast".

An analysis of the amount claimed by Appellant on account extra cost of procuring ballast will reveal that pursuant with the agreed statement of facts (R-6) that an item of \$2,366.26 is set forth as being the cost of "extra train hauls from Jasper to". The testimony of Mr. Douglas Salm, Appellant's superintendent at the job site, (R-127) reveals that the Jasper Switch is on the new construction. The sub-contract provides that the ballast material shall be delivered to the Appellant "on

the relocated portion of the Southern Pacific line" (Page 2, Def. Ex. 2). The undisputed facts and testimony establish that the item of \$2,366.26 included in the claim of \$9,872.70 was improperly assessed under any theory. The claimed extra cost to Appellants of the additional ballast required should, therefore, be reduced by this sum of \$2,366.26.

II. Comments on Appellant's authorities.

The authorities cited in Appellant's brief fall within categories which may roughly be designated as follows:

- a. Cases pertaining to "requirements contracts;"
- b. Necessity of performance regardless of difficulty or loss;
- c. The parole evidence rule;
- d. Consideration must accompany modification of contract;
- e. Interest.

a. The cases cited with reference to "requirements contracts" merely enunciate the elementary rule of law sustaining the validity of such contracts as said rule of law is commented upon in the annotation in 14 A.L.R. 1300. In the instant case there is no dispute that the "estimated quantity" of ballast material as the same is set forth in the prime contract did not limit or control

the quantity of ballast that Appellee might have been called upon to produce and stockpile. It is agreed that the matter of Appellant's requirements could well be more or less than this quantity but the real dispute rests in the matter of Appellant's obligation to advise Appellee of this quantity. In none of the cases dealing with "requirements contracts" cited by Appellant do we find a case dealing with the delivery of requirements wherein the purchaser was not obligated to place his order and advise the seller the extent of these requirements. In every instance the converse is true and the purchaser has always made his requirements known, and the litigation thereafter ensued because the seller failed or refused to deliver these requirements. See

Brooks vs. Bechill, 63 Ore. 200, 124 Pac. 201;
Cragin Products Co. vs. Fitch et al, 6 F. (2d) 557;
Tampa Shipbuilding & Engineering Co. vs. General Const. Co. 43 F (2d) 309.

b. The cases cited with reference to a claim of excuse for nonperformance by reason of loss or delay have no bearing in the instant case. It was not Appellee's contention that there was any non-performance of their contractual obligations. Appellee did fully perform its contract agreement to the best of its ability, and the requirement for additional ballast with which Appellant was faced was resultant from Appellant's own act. It is conceded that the mere fact that performance will result in loss is no excuse, however, in the instant case

Appellee was ready and willing to perform and to put into stockpile such requirements of ballast material as Appellant should designate. This willingness is evidenced by the exchange of correspondence requesting this information.

c. Appellee likewise concedes the general rules relating to parole evidence as being inadmissible to modify a contract which is complete upon its face. The cases cited by Appellant to enunciate this rule do, however, emphasize the fact that parole evidence is admissible to explain an incomplete or ambiguous contract. See

American Contract Company v. Bullen Bridge Company, 29 Ore. 549, 46 Pac. 38.

In every case cited with reference to the parole evidence rule it is noted that the first consideration is a contract complete on its face and one in which the parties are endeavoring by parole to add to, subtract from, or otherwise alter or change the clear language of the contract. In the instant case the parole evidence admitted came clearly within the purview of ORS 42.220. The parole evidence to which Appellant objects merely confirms the intent and understanding of these parties as to the meaning of the contract, and the intent and meaning of the contract in the light of the customs and usage of the trade. In *Taylor v. Wells*, 188 Ore. 648, at page 654, the Court states:

“We are reminded that ‘for the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.’”

d. Appellant’s contentions with reference to a modification of the contract of these parties are wholly extraneous to the matter at issue. The citations urging the proposition that a modification of an existing contract must be accompanied by a consideration is beyond dispute. This rule of law, however, has no application in the instant case as the matter of modification of the contract existing between these parties was not in issue. If modification existed this modification was resultant from the efforts of Appellant to modify and enlarge their contract with the Corps of Engineers after the execution of the sub-contract, and then to impose these increased obligations upon Appellee.

Commenting further upon Appellant’s citations, it is noted that in *Savage vs. Salem Mills Co.*, 48 Ore 1, 85 Pac. 69, the Court states:

“and, in the absence of an agreement to the contrary, the usage or custom of a particular business will enter into and form a part of the contract made by a person engaged in such business and those dealing with him with knowledge of such custom and usage, although proof of a custom and usage is never admissible to give interpretation to a contract inconsistent with its language.”

e. Exception is taken to the language appearing in Appellant's brief, page 53, to the effect that "there are only two types of interest, namely, contractual interest or interest as damages which are recognized by law. *City of Seaside vs. Oregon S. and C. Co.*, 87 Ore. 624; 634." The language appearing in that case to which Appellant apparently refers states:

"There are two ways only in which interest may be collectible: (1) by contract to pay interest; and (2) by statutory authority."

The distinction in this language is apparent when construed in conjunction with O.R.S. 82.010.

The syllabus in *McCarty vs. Gault*, 24 F. Supp. 977, states:

"Interest should be allowed where principles of equity and justice in enforcement of an obligation demand, even though there is no legislative mandate."

In the instant case there can be no doubt that the sum of \$9,872.70 was the ascertained amount which Appellant had retained from the account of Appellee, and the date upon which this account matured was not disputed.

It has further been established that Appellant

received and retained the full sum of \$14,582.92 from the Corps of Engineers, and that this money was the property of Appellee, less only Appellant's handling charges and costs in conjunction with processing the claim. The record illustrates that these figures for processing and handling were solely within the knowledge of Appellant, and that Appellant could easily have ascertained the amount of these claims and should have immediately tendered the balance to Appellee. The record discloses that Appellant did not notify Appellee of receipt of the said sum (R-179), and, likewise, Appellant *wholly* failed to advise or make demand upon Appellee for the amount claimed by Appellant on account of expenses of processing the claim.

The established facts regarding Appellant's receipt and retention of the funds in question and the resultant loss of the use of these funds by Appellee fall within the purview of O.R.S. 82.101 and the allowance of interest cannot be denied upon the mere fact that Appellant refrained from asserting or making known to Appellee any charges or expenses to which Appellant was entitled by reason of processing the claim to the Corps of Engineers.

The contention that since Appellee's Complaint made demand in the sum of \$11,742.77, which sum combined the sum of \$9,872.70 (amount retained by Appellant on account claimed extra cost of procuring ballast) and the additional sum representing Appellee's claim on account movement of railroad cars does not render the

amount on account the extra cost of procuring ballast as an unliquidated sum. The amounts referred to above were at all times definite and certain and it was so stated in the agreed statement of facts (R-6).

Appellant has enjoyed the use and possession of these sums of money, and the attendant obligation to remit the same to Appellee, together with interest thereon, is manifest.

SUMMARY AND CONCLUSION

The matters in dispute in the instant case concern themselves only with the question of the Appellant's obligation during the term of that portion of the sub-contract dealing with the stockpiling of ballast material to make known their requirements of such material. The Appellee's obligation was clear to the effect that Appellee was obligated to manufacture and stockpile such quantity of ballast material by a date certain as Appellant would require. If it be found that Appellant was obligated under the terms of this sub-contract agreement to make his requirements known during the term of this contract, then obviously it must follow that Appellant's failure to so do must result in an affirmance of the existing judgment. The facts and the law pertaining to this matter leave no doubt as to the security of Appellee's position.

The matters in issue are not those contended for in Appellant's brief. Appellee does not now, nor at any time during the association of these parties has Appellee contended that there was a basis for excuse for performance, excepting as Appellee was denied the right to produce in stockpile all of Appellant's requirements by reason of Appellant's failure to make those requirements known.

The parties entered into a contract, which contract made reference to and incorporated certain features of

Appellant's prime contract with the Corps of Engineers. Appellant now is endeavoring to impose upon Appellee *all* of the terms and provisions of the prime contract, even as the same was subsequently altered and amended without the consent or knowledge of Appellee.

Appellants have retained sums of money, which sums are definite and certain, and have always been readily ascertainable, and Appellee is entitled to the payment of these sums, together with interest thereon at the statutory rate of six (6%) per cent per annum from the date of maturity of these accounts.

For the reasons stated herein, the judgment of the District Court entered herein should be affirmed.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon*

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vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon*

BASIS OF JURISDICTION

This action originated in the United States District Court for the District of Oregon by the filing by Appellees of a complaint wherein they sought to recover under a contract between themselves and Appellants the aggregate sum of Twenty-Eight Thousand Two Hundred Eighty-Seven and 51/100 Dollars (\$28,287.51), to-

gether with interest. The jurisdiction of the court was based upon diversity of citizenship under Title 28, U.S. Code, Judiciary and Judicial Procedure, Section 1331, in that Appellees were citizens of the State of Washington while Appellants were Missouri and California corporations. The District Court entered a pre-trial order on January 30, 1956, which set out the admitted facts (R. 3-7) and defined the specific issues to be tried (R. 8-19). The case was tried to the Court without a jury in January and February, 1956, and on March 4, 1957, the trial court rendered its opinion (R. 23-25). Findings of fact and conclusions of law (R. 25-23) and judgment (R. 32-33) were entered on May 6, 1957. On January 4, 1957, notice of appeal from a part of the judgment (R. 34) with undertaking, was filed in the office of the Clerk of the District Court. This Court has jurisdiction of the appeal under the provisions of Section 1291 of Title 28, U.S. Code, Judiciary and Judicial Procedure.

STATEMENT OF THE CASE

Appellant, on January 31, 1951, contracted as a prime contractor to furnish labor and materials in the relocation of a part of the Southern Pacific Railroad main line necessitated by the construction of the Look-out Point Dam in Lane County, Oregon. (Def. Ex. 1). The other party to the contract was the United States of America acting by and through the Corps of Engineers of the United States Army, hereinafter referred to as the "Army Engineers".

Thereafter, and by instrument dated June 10, 1951, Appellee contracted with Appellant, as a sub-contractor,

to perform certain parts of Appellant's contract (Def. Ex. 2). Appellee agreed to furnish, among other things, all of the ballast material required for the job and to load the material into railroad cars to be furnished by Appellant at the cost of \$2.20 per cubic yard.

Appellee crushed and stockpiled a quantity of the ballast material and against the protests of Appellant and before the job was completed, removed the crushing plant and crushed no more ballast material. Appellant was compelled to procure an additional amount of the ballast material from commercial sources in order to complete the prime contract. The additional cost of the ballast material so procured was charged to Appellee by Appellant.

Appellee, in loading the material into the railroad cars, found it necessary to move the cars under the loading apparatus and did so for a time but refused to move the cars during the period while loading was still in progress. Appellant thereupon moved the cars during the remainder of the loading operation and charged the cost thereof to Appellee.

Appellee made demand upon Appellant for the sum of Eleven Thousand Seven Hundred Forty-Two and 77/100 Dollars (\$11,742.77) composed of Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars (\$9,872.70) withheld for the extra cost of ballast material and the sum of One Thousand Nine Hundred Sixty-One and 81/100 Dollars (\$1,961.81) as the cost of moving the cars. Appellee also made demand upon Ap-

pellant for the sum of Seventeen Thousand Eighty-Five and 28/100 Dollars (\$17,085.28) representing the reasonable value of labor, equipment and services furnished by Appellee in other work outside the scope of the subcontract. Appellant submitted the claim for the extra work to the Army Engineers and that governmental agency approved the claim in the lesser sum of Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars (\$14,582.92).

Appellee thus sought to recover in this proceeding Eleven Thousand Seven Hundred Forty-Two and 77/-100 Dollars (\$11,742.77) plus interest and the sum of Fourteen Thousand Five Hundred Eighty-Two and 77/-100 Dollars (14, 582.92) plus interest.

The case was tried before the court and the court held that Appellee was entitled to recover from Appellant the sum of Nine Thousand Eight Hunderd Sixty-Seven and 87/100 Dollars (9,867.87) with interest thereon at the rate of six percent (6%) per annum from December 17, 1952 until paid; the court held that it was the obligation of Appellee to move the cars under the loading apparatus and that Appellant was rightfully entitled to withhold from Appellee the cost incurred by Appellant in continuing the movement of the cars under the loading apparatus after Appellee had refused so to do. The court further held that Appellee was entitled to the sums recovered from the government by Appellant for the extra work mentioned above, less, however, five percent (5%) of the award for administrative

expense incurred by Appellant and the further sum of one percent (1%) of the award for bond expense incurred by Appellant; the court thereupon rendered its judgment in favor of Appellee and against Appellant for the additional sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94) with interest at six percent (6%) from April 1, 1953 until paid.

It is from only a part of this judgment that Appellant has appealed, namely, the award of Nine Thousand Eight Hundred Sixty Seven and 87/100 Dollars (\$9,867.87), together with interest at the rate of six percent (6%) per annum from December 17, 1952 until paid, and interest at six percent (6%) per annum upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94) from April 1, 1953 until paid.

QUESTIONS PRESENTED

1. Was there any competent, satisfactory evidence to support the court's findings that it was the intention, agreement and understanding of the parties that Appellee would be furnished by Appellant with information as to the final quantity requirements of ballast material and that Appellee was without fault or neglect in stockpiling a quantity of ballast material insufficient to satisfy Appellant's requirements under its contract with the United States?

2. Did the court err in holding that Appellee was entitled to interest upon any of the sums found to be

owing by Appellant to Appellee?

STATEMENT OF POINTS TO BE URGED

1. The court erred in failing to hold that Appellee was bound under its sub-contract with Appellant by the terms and conditions of the general contract between Appellant and the United States, which general contract was specifically incorporated in said sub-contract by reference.

2. The court erred in holding the Appellee was not obligated to furnish all ballast material required to complete Appellant's contract with the United States.

3. The court erred in holding that Appellee was without fault or negligence in stockpiling a lesser quantity of ballast material than was necessary to complete Appellant's contract with the United States.

4. The court erred in holding that Appellant was obligated, under the terms of its sub-contract with Appellee, to notify Appellee of the exact quantity of ballast material to be produced to complete the work contemplated by Appellant's contract with the United States.

5. The court erred in failing to find that it would have been impossible for Appellant to anticipate the quantity of ballast material required to complete the work required under Appellant's contract with the United States prior to the date upon which Appellee

dismantled its crushing plant.

6. The court erred in holding that Appellee fully performed its sub-contract with Appellant as to the quantity of ballast material to be furnished.

7. The court erred in holding that Appellee was entitled to interest at six per cent (6%) per annum from April 1, 1953 until paid, upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94).

8. The court erred in failing to enter judgment for Appellant with respect to Appellee's demand of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87).

9. The court erred in holding that Appellee was entitled to interest at six per cent (6%) per annum from December 17, 1952 until paid, upon the sum of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87).

SUMMARY OF ARGUMENT

The court erred in finding and holding that Appellee fully performed its contract with Appellant. The contract between the parties contemplated that Appellee would be bound by all the provisions and obligations of Appellant in its contract with the United States which prime contract set forth an estimated quantity of ballast material but indicated that it was an estimate only and that the prime contractor would be required to furnish

all ballast material required whether or not the same would be greater than or less than the estimated quantity, and in also holding that Appellee was without fault or negligence in stockpiling a lesser quantity of ballast material than was necessary to complete the prime contract with the United States.

The facts in the case conclusively show that Appellee was required under the terms of its agreement with Appellant to furnish all ballast material required. The contract was silent with respect to any obligation upon the part of the Appellant to notify Appellee of the exact amount of ballast material to be produced and stockpiled and that although Appellee constantly made demand upon Appellant to notify Appellee of the amount of ballast material to be produced and stockpiled, Appellant was unable to obtain that information and thus did not so notify Appellee. The facts will show that Appellant was under no obligation to furnish such information to Appellee, that there was no understanding that such information should be furnished either before the contract was executed or during the period of time in which the contract was being performed.

It will also be shown that the amounts found to be due Appellee from Appellant were not liquidated sums, that they were disputed amounts and that in such a situation, interest is not an allowable item.

STATEMENT OF FACTS

The Army Engineers invited bids, late in 1950, for work to be done in the relocation of the Southern Pacific mainline track necessitated by the construction of the Lookout Point Dam in Lane County, Oregon. The work consisted of shaping and placing roadbed topping on a sub-grade made by other contractors, the placing of ties and rails on the roadbed, and, finally, the labor and ballast material required to complete the trackage, approximately sixteen miles in length. The digging, shaping, filling, cutting of trees, etc., required in the preparation of the sub-grade was the responsibility of other contractors who were parties to prime contracts with the Army Engineers.

Appellant Lookout Point Constructors was a joint venture formed by two railroad construction companies for the purpose of bidding on and performing the contract. Appellant was the successful bidder and on January 31, 1951, the prime contract between the United States and Appellant was executed (Def. Ex. 1).

Appellee, Curtis Gravel Company, a partnership, learned of Appellant's contract in February, 1951, obtained a set of the plans and specifications from the Army Engineers and asked to bid upon a part of the work. On March 18, 1951, Appellee was invited by Appellant to bid as a sub-contractor on certain portions of the work. (R-131; Def. Ex. 21a). Mr. Marland Curtis and others in his organization visited the site, observed

the conditions and noted that work required to be done by other contractors before Appellant could proceed had been delayed. Thereafter and on March 22, 1951, Appellant submitted a detailed proposal giving prices and specifications for the performance of certain of the work required to be done by Appellant (Def. Ex. 22).

On April 12, 1951, Appellant submitted a proposed draft of sub-contract to Appellee (Def. Ex. 24). Appellee, on April 15, 1951, replied, requesting certain changes (Def. Ex. 25) and on April 24, 1951, Appellant submitted an amended agreement embracing the changes suggested by Appellee (Def. Ex. 26). This form of agreement was not returned by Appellee nor did Appellee request any additional changes (R. 131-132).

Not having heard from Appellee, Appellant, on May 12, 1951, wrote requesting performance bond if Appellee had found the agreement to be satisfactory (Def. Ex. 27; R. 59), Appellee, on May 17, 1951, returned the agreement unexecuted, explaining that difficulty had been encountered in securing a performance bond (Def. Ex. 27). Appellant then wrote that it would delay until June 10, 1951, in order to give Appellee an opportunity to secure the bond (Def. Ex. 29).

Appellee did not secure the bond until late in July, 1951, and thereafter executed the agreement but back dated it to June 10, 1951. On August 2, 1951, an original of the sub-contract was returned to Appellee; said agreement, as finally signed, was the amended sub-contract

sent to Appellee by Appellant on April 24, 1951 (R58-199; Pl. Ex. 21).

Both Appellant and Appellee commenced performance of their respective portions of the general contract late due to delays in preparation of the sub-grade by other contractors. Consequently, Appellee was unable to complete its portion of the prime contract agreed upon its part to be performed by May 15, 1951, the date set forth in the sub-contract, and both Appellee and Appellant failed to complete performance of Part A of the contract by June 1, 1951, the penalty performance date set forth in the general contract. (Def. Ex. 1). On June 25, 1951, Appellee advised Appellant that time for performance would have to be extended due to delays in performance by other general contractors. (Pl. Ex. 2a) Subsequently and on August 2, 1951, a change order was made by the Army Engineers extending the penalty date for completion of Part A of the contract until August 9, 1951. (Def. Ex. 8-a).

Performance of Part B of the general contract which involved the ballast material which is the subject of this appeal, was also held up due to delays of other prime contractors (Pl. Ex. 2-a). As a consequence, Appellee failed to make the October 15, 1951, performance date set forth in the sub-contract and both Appellant and Appellee failed to complete performance of Part B within the penalty performance date set forth in the general contract. Appellant applied for and received an extension of time for performance of both Appellant and Appellee's portions

of the work to be done under Part B and notified Appellee that the government had extended the penalty performance date by change order to June 6, 1952, (Def. Ex. 41). The Army Engineers determined that delays in performance by both Appellant and Appellee were occasioned by delays of other contractors and subsequently issued change order 8-D extending the time of performance to August 10, 1952, (Def. Ex. 8-d).

These necessary delays in performance produced additional costs and difficulties for both Appellant and Appellee. However, the prime contract made provision for such delays (Def. Ex. 1-Paragraph GC-11, Page GC-4), and authorized the Army Engineers to grant extensions of time or equitable adjustments where justified delays resulted in additional expense. The Engineers granted a number of time extensions and additional expense allowances by change order under authority of this paragraph, including the extensions of time mentioned above (Def. Ex. 8-a; 8-c; 8-e, etc).

As the delays in the progress of other contractors increased, Appellee became more and more concerned about the need to keep its ballast crushing equipment at the quarry site for a longer period than it had originally planned, and Appellee repeatedly asked the Army Engineers, Appellant, and other prime contractors to assist them with an advance determination of the contract ballast requirements. On reply to such requests for assistance, Appellant gratuitously advised Curtis on September 21, 1951, that Appellant would cooperate and give

Appellee any help that it could; that Appellant had not made any calculations of ballast requirements, but that this information was being requested and that Appellant would furnish Appellee with such a determination within two weeks. (Pl. Ex. 2-b).

Appellant made an honest attempt to assist Appellee with such a determination but was unable to secure an accurate estimate due to the job conditions and delays in site availability resulting from delays of other prime contractors (Def. Ex. 4-d; 4-g; 4-h; 32, 33). The prime contract between Appellant and the United States contained an estimated quantity of ballast material of 56,000 cubic yards but specified that that quantity was an estimate only and that "within the limit of available funds, the contractor will be required to complete the work specified herein in accordance with the contract and at the contract price or prices whether it involves quantities greater or less than the following estimates". (Def. Ex. 1)

On November 24, 1951, Appellee informed Appellant that Appellee could not assume responsibility for production of contract requirements above the estimated quantity unless Appellee was immediately advised of the extent of such requirement (Pl. Ex. 2-c). On December 3, 1951, Appellant replied that Appellee was obliged under the terms of the agreement to produce all ballast material needed for the job irrespective of the quantity required, that Appellant had endeavored as a matter of courtesy, to call any obvious error in the estimates to

Appellee's attention but that there might be an overrun and that Appellant could not furnish any more definite or accurate information at the time (Def. Ex. 4-f).

Appellee did not reply to this letter, (R-74) nor did Appellee make any claim that it was excused from furnishing the rest of the contract ballast requirements because of any alleged oral agreement theretofore made by the parties (R-76). On March 14, 1952, Appellant received a report from its site superintendent that Appellee had dismantled its rock crushing plant. Appellant again reminded Appellee of Appellee's obligation to furnish all contract ballast requirements and asked to be advised of Appellee's plans to furnish additional material in case the stockpile proved to be insufficient to finish the job (Def. Ex. 4-K).

On April 5, 1952, Appellee informed Appellant that Appellee was inexperienced in railroad construction, could not make a close determination of the ballast requirements, that crushing plant equipment rental ran approximately \$40.00 per hour and that the plant could not be maintained indefinitely at the site without running up considerable expense. Appellee also wrote that it had done everything possible, that it was not obligated to keep the plant at the site any longer and that it had produced approximately 4,000 cubic yards of ballast beyond the contract estimate at its own risk and expense (Pl. Ex. 2-e).

On April 14, 1952, Appellant replied again remind-

ing Appellee of Appellee's obligation to produce all ballast required for the job. It was conceded that delays in work progress which were not the fault of Appellee, might make it uneconomic for Appellee to continue maintaining the plant at the site but suggested that Appellee make arrangements to purchase any additional ballast requirements from a local quarry or that Appellee produce additional ballast and make arrangements to sell any overrun to the Southern Pacific Railroad. Appellant concluded, "We do not say that you might not have a claim which can be processed successfully if you are injured in this transaction, but we do think you are obligated to perform and we expect you to." (Pl. Ex. 2-f).

On May 8, 1952, Appellant advised Appellee that the stockpile of ballast was running short, that work progress indicated that 64,000 to 65,000 yards would be required and asked to be advised of Appellee's plans for providing the balance of the requirement (Def. Ex. 4-o). Appellee made no reply to this letter (R.154). On May 9, 1952, Appellant advised Appellee by wire that the ballast supply would be exhausted within the week (Def. Ex. 5-a). On May 13, 1952, Appellant advised Appellee that Appellant was acquiring ballast from commercial sources at Appellee's expense (Def. Ex. 5-b).

Appellant contends that it was rightfully entitled to charge Appellee with the difference between the sub-contract price of the ballast material and the commercial price of the additional ballast material required for the

work. This amounted to Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars (\$9,872.70) which is approximately the same sum as the court awarded Appellee (\$9,867.87) in this regard.

Appellant filed requests for additional compensation with the Army Engineers covering a number of items of expense occasioned by the delays in site availability. Appellant included requests for items covering stand-by rental of Appellee's equipment and the added cost of producing ballast, and offered the proceeds of these claims to Appellee in exchange for a release by way of settlement and compromise. Appellee contended that the proceeds of the successful claims among these items should be for its account but that the rest should be paid by Appellant. Appellant contended that Appellee was being completely inconsistent, and no settlement was reached. In the spring of 1952, the Army Engineers awarded Appellant most but not all of its claim arising from stand-by rental for equipment furnished by Appellee due to delays in site availability (Def. Ex. 8-e). The change order was backdated to October 1, 1952. The claim for excess costs incurred by Appellee in furnishing ballast due to delays was less successful.

1. Appellee was obligated to furnish all ballast material required to complete Part B of the General Contract.

Appellant withheld the sum of Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars (\$9,872.70) from Appellee on account of the cost of procuring

ballast from commercial sources after Appellee failed to furnish all ballast required to complete the job. The furnishing of this ballast was called for under the following sections of the general contract (Def. Ex. 1):

“SW-1. DESCRIPTION OF WORK. -a Work to be Done: (See Article 1 of the Contract). The work consists of furnishing all plant, labor, materials and equipment, except property specified to be furnished by the Government, and performing all work in strict accordance with these specifications and schedules and drawings forming parts thereof for constructing approximately 16 miles of track from Station 1274-00 on Southern Pacific Company's relocated main line to Station 2067-25, and a shoofly track from approximately Station 1992-65 to about Station 2033-94.” (page SW-1).

“SC-3. ESTIMATED QUANTITIES. — The quantities listed below are estimates only. Within the limit of available funds the Contractor will be required to complete the work specified herein in accordance with the contract and at the contract price or prices whether it involves quantities greater or less than the following estimates,” (page SC-1).

ESTIMATED QUANTITIES (Cont'd)

Item No.	Estimated Quantities	Unit	Description of Item
3b	56,000	Cu. Yd.	Ballast material ” (page SC-3)

Appellee and Appellant entered into a sub-contract (Def. Ex. 2) under which Appellant sublet certain parts of the work set forth in the general contract, including Item 3-B, under which Appellee was obligated to furnish, stockpile and load all ballast needed for the job.

The relevant portions of the sub-contract read as follows:

“WHEREAS, the Contractor is desirous of sub-contracting certain parts of the work set forth in the General Contract, hereinafter in detail described,” (page 1, Def. Ex. 2).

“In addition to the complete work items set forth above, the sublet work is to include a part of Part B, Item 3b, ballast material. The work sublet under this item consists of the procurement of a material site, the manufacture of the ballast material, the stockpiling of same, the construction of roads and subgrades, and the loading of the stockpiled material into railroad cars furnished by the Contractor,” (page 2, Def. Ex. 2).

“1. Subcontractor agrees to furnish all the material and tools and equipment, and to perform all the work, labor and supervision necessary to complete the above described Sublet Work, at all times subject to and in full compliance with the General Contract, and to complete the same with skilled and reputable employees in workmanlike fashion to the approval and acceptance of the Principal.” (page 3, Def. Ex. 2).

“Part B, Item 3b, as described in the sublet work, ballast material, \$2.20 per cubic yard. Estimated quantity, 56,000 cubic yards. The quantities listed above are estimates only. The Subcontractor will be required to complete the work specified above in accordance with this contract and at the price or prices whether it involves quantities greater than or less than the above shown estimates,” (page 4, Def. Ex. 2).

“19. All provisions of the General Contract and the specifications and working drawings are included as a part of this Sub-contract the same as though written in full herein.” (page 9, Def. Ex. 2).

The language in the portions of both general and sub-contracts is clear, plain, and unequivocal. It is obvious that Appellee was called upon to furnish all ballast material called for under Part 3-B to complete the job, irrespective of whether such quantities exceeded or were less than the estimated quantity of 56,000 cubic yards.

The courts have regularly so held in contracts which are far less clear than the one at bar.

Maryland Dredging & Contracting Co. v. Coplay Cement Mfg. Co., (D.C.E.D. Pennsylvania) 265 Fed. 842 (1920)

Defendant cement company agreed to sell Plaintiff 225,000 (approx.) barrels of cement to be used in the construction of a particular drydock in Philadelphia. Defendant failed to supply this cement, and Plaintiff obtained same from other sources, and sued for damages. Defendant demurred, and the Court sustained the demur and ordered a new trial on the ground that Defendant's contractual obligation was to furnish the quantity of cement required for the job, and in the precise amount of 225,000 barrels. The Court said:

"In the present case there was no averment in the statement of claim that 225,000 barrels of cement was the quantity required for the construction of the drydock, nor was there proof at the trial that that quantity was required. The contract clearly falls within the class where the quantity, although approximately stated, is to be determined according to the plaintiff's requirements for the construction of the drydock," (page 844).

Similarly:

N. S. Sherman Machine & Iron Works v. Carey Lombard, Young & Co., 227 Pac. 110 (Oklahoma, 1924) hereinafter discussed.

Tampa Shipbuilding & Engineering Co. v. General Const. Co., C.C.A. 5, 43 Fed. 2d 309 (1930).

Cragin Products Co. v. Fitch, et al, C.C.A. 8, 6 F. (2d), 557 (1925).

Brooks v. Bechill, 63 Or. 200, 124 Pac. 201 (1912).

National Pub. Co. v. International Paper Co., C.C.A. 2, 269 Fed. 903 (1920).

26 A.L.R. 2d 1099, 1125.

Furthermore, on December 3, 1951, Appellant reminded Appellee of its obligation to produce all ballast required for the job in the following words:

"I am sure that by the terms of our agreement, that Curtis Gravel Company is obliged to produce all ballast material required, irrespective of the quantity needed. It is our thought that a very careful check of the quantity of material required might reveal an error in the specified quantity, and as a matter of courtesy, we intended to call any such obvious error to your attention." (Def. Ex. 4-f).

Appellee made no reply asserting any different understanding or construction of the contract (R. 74). Appellee could not do so in view of the plain language set forth in both the General Contract and Sub-contract.

Appellee certainly understood its obligation to provide all ballast required for the job, or it would not have made repeated efforts to try and ascertain in advance just what the requirements might be.

On May 8, 1952, Appellant advised Appellee by letter that the available quantity of ballast was inadequate, and that additional ballast would be required to complete the job (Def. Ex. 4-o).

On May 9, 1952 Appellant sent Appellee the following telegram: "Lookout Point ballast supply exhausted this week. If no other source suggest you contact MKM and local producers for remaining requirements. Advise." (Def. Ex. 5-a).

Appellant received no reply to the above telegram, and sent the following telegram to Appellee on May 13, 1952:

"Account your failure provide stone ballast Lookout Point relocation conformance terms your subcontract we have arranged to procure same from commercial sources at your expense. Procurement will commence May Fifteen." (Def. Ex. 5-b).

Accordingly, Appellant was entitled to obtain the additional ballast required under Item 3-B and to charge Appellee with the difference in cost of obtaining same over the agreed price under paragraph 10 of the subcontract (Def. Ex. 2, page 6), which provides: "Should Contractor take over completion of this work, the expense of completion shall be deducted from any sums that may then be due or that may thereafter become due subcontractor by virtue of this agreement."

Appellant charged Appellee with the sum of Nine Thousand Eight Hundred Seventy-Two and 70/100 Dollars (\$9,872.70), constituting the difference between the cost of procurement of ballast from commercial sources and the sub-contract price.

II. APPELLEE WAS NOT EXCUSED FROM PERFORMANCE BY DELAYS OF OTHER CONTRACTORS.

Appellee contented that it should be excused from performance of its contractual obligation to furnish the ballast for the job because of delays of other contractors in that it precluded completion of Parts "A" and "B" of the contract within the original completion dates set forth therein. This contention is not well founded in law and is not reflected in the actions of the parties, and also disregards the express provisions of the general contract covering such delays.

Under the terms of the sub-contract, Appellee was obligated to complete Part A by May 15, 1951, and to complete Part B by October 11, 1951. The relevant section of the sub-contract provides as follows:

"3. Subcontractor agrees to commence the sublet work described in Part A of the General Contract at once and to complete the same on or before May 15, 1951; to commence the sublet work described in Part B of the General Contract on May 1, 1951, and complete the same on or before October 11, 1951." (Def. Ex. 2, page 4).

Site availability was admittedly delayed due to failures of other contractors and Appellee and Appellant were both late in commencing performance of Part A of the contract. Although Appellee was obligated to complete its portions of Part A by May 15, 1951, under the sub-contract, and both Appellee and Appellant were obligated to have Part A completed by the penalty date of June 1, 1951, Appellee was unable to complete the work on time and continued to perform after the sub-contract date. Appellant claimed no penalty for Appellee's delay in performance and obtained a Change Order dated August 2, 1951 (Def. Ex. 8-a), which extended the penalty date of completion until August 9, 1951.

Appellee was also late in performing Part B and continued producing and stockpiling ballast after the sub-contract performance date of October 11, 1951. Appellant claimed no penalty for Appellee's failure to perform this part either, since performance within the agreed time would have been impossible due to delays in site availability. Both Appellant and Appellee were delayed beyond the penalty dates set for Part B. Both parties continued to perform well into the spring and summer of 1952 and Appellant obtained successive covering extensions of time for performance of June 6 and August 10, 1952 (Def. Ex. 41, 8-c, 8-d).

a. Delay of other contractors in readying the site for performance of Part B of the General Contract did not excuse Appellee from performance of the contract.

Even though Appellee continued to perform beyond its subcontract completion date of October 11, 1951, that the delays which prevented completion of the work by the original prime contract penalty dates somehow excused Appellee from its contractual obligation to provide all the ballast required under Part B. This very claim was decisively rejected in an identical situation presented in the case of

N. S. Sherman Machine & Iron Works v. Carey, Lombard, Young & Company, Oklahoma (1924), 227 Pac. 110.

Where the Court said:

The element that distinguishes the authorities cited and relied upon by Appellants from those cited and relied upon by appellees is that in one instance, taking the contract as a whole, there is an agreement to furnish material for the construction and completion of a certain contract or work for which purpose the buyer is purchasing the material; ***where the purchase is for a certain and definite purpose, all of which facts are made known to the seller, and especially in contracts such as the one with which we are now dealing, ***then the amount of material necessary to complete the job or contract of the purchaser becomes the essence of the contract, rather than the specifications, wherein a certain amount of material is designated, more or less, ***we think, under the terms of this contract, the Defendant was entitled to all the cement of the brand specified in the contract, and at the price specified in the contract necessary to complete the (job)."

The provisions of the contract at bar clearly indicate that Appellant and Appellee were both obligated to perform the agreed work irrespective of delays, and that the penalty completion dates were set forth in the contract to provide liquidated damages for the government if a contractor's delays were not justified and performance time was not extended by change order. The applicable portions of the general contract provide:

“ARTICLE 5. Delays - Damages — (a) Termination for Default. If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay.” (Def. Ex. 1, page 3).

(b) Damages for Delay. - If the Government does not terminate the right of the Contractor to proceed, as provided in this article, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, or liquidated damages for each calendar day of delay until the work is completed, or if such liquidated damages are not so fixed, any actual damages occasioned by the delay.” (Def. Ex. 1, page 3).

“(c) Time Extensions. — The right of the Contractor to proceed shall not be terminated as provided in this article, nor the Contractor charged

with liquidated or actual damages, because of any delays in the completion of the work due to cause which he could not reasonably have anticipated and which were due to causes beyond his control and without his fault or negligence, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, either in its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargo, and unusually severe weather, or delays of subcontractors due to such shall promptly notify the Contracting Officer in writing of the causes of such delay. Upon receipt of such notification the Contracting Officer shall ascertain the facts and the extent of such delay and, if in his judgment the facts so justify shall extend the time for completing the work commensurate with the period of excusable delay. The Contracting Officer's findings of fact thereon shall constitute his decision which shall be final and conclusive on the parties hereto subject to appeal by the contractor within thirty (30) days therefrom as provided in the 'Disputes' Article herein." (Def. Ex. 1, page 4).

"SC-2. LIQUIDATED DAMAGES. — In case of failure on the part of the Contractor to complete the work within the time fixed in the contract or any extensions thereof, the Contractor shall pay the Government as liquidated damages the sum of \$200.00 for each calendar day of delay until the work called for under Part 'a' is completed or accepted, and the sum of \$400.00 for each calendar day of delay until the work called for under Part 'B' is completed or accepted." (Def. Ex. 1, page SC-1).

The following paragraphs from letters sent to Appellant by Appellee during the progress of the work clearly indicate that Appellee was familiar with the clear accepted meaning of the above provisions:

“You were advised in our letter of June 25, 1951 that an extension of time would be necessary because of delay and damage to this contractor by failure of the government to turn over the grade at the specified time. We have never received acknowledgement of this letter, however it is assumed that you did receive it. Please advise if this is not the case.” (Pl. Ex. 2-a).

“We wish to point out that The Utah Construction Company was unable to work in that area until late July and early August, despite the fact that last years season was very dry and early, however we do not wish to be responsible for the incurring of any liquidated damages resulting from failure to complete the slide removal.” (Def. Ex. 18).

In any event, extra costs, losses or time incurred by Appellant and Appellee were expressly provided for under GC11 of the prime contract (Def. Ex. 1, P. GC4) and of the sub-contract sections 19 and 11 (Def. Ex. 2, P. 9 and page 7).

The Government granted extensions of completion time, in fact, and allowed additional costs in the case at bar because of the delays caused by other contractors. These extensions and allowances were authorized under the provisions of Paragraph GC-11 (Def. Ex. 8a, 8c, 8d, 8e, etc.). Both Appellant's and Appellee's rights in the event of delays are governed by the above mentioned contract provisions.

The law is well settled that neither Appellant nor Appellee are entitled to any consideration, excuse or benefit (other than equitable adjustments under the provisions of the general contract) because the performance of their respective portions of Part "B" of the contract was delayed by others and could not be completed within the initial period prescribed by the government, which was extended by change order.

United States v. Miller-Davis Co., et al, D.C. Conn., 61 F. Supp. 89 (1945).

H. E. Crook Co., Inc. v. United States, 270 U.S. 4, 46 S. Ct. 184 (1926).

United States v. Rice, et al., 317 U. S. 61, 63 S. Ct. 120 (1942).

United States v. Howard P. Foley Co., Inc., 329 U.S. 64, 67 S. Ct. 154 (1946).

The general contract in the case at bar contains the same provisions with respect to delay, penalty clauses, liquidating damages, termination or suspension of work, etc., which are found in the contracts discussed in the above cited cases. In the case at bar, as in the cases above, the time for performance of the contract was extended by change order. In the case at bar, as in the cases above, Appellee (as well as Appellant) was admittedly inconvenienced by delays in the progress of the work of other contractors. The terms of the contract and the decisions of the authorities make it clear that Appellee did not have any vested right to complete

performance before the original penalty completion date, and that its sole remedy for delay was to seek allowance for additional costs where justified under the terms of the contracts at bar.

b. The claim that performance would be more costly to Appellee because of delays and weather conditions did not excuse Appellee from its contractual obligations.

The authorities discussed above make it clear that Appellee was obligated to produce the ballast required by the contract, even though the period of performance extended beyond the original penalty completion date prescribed by the Government. The same authorities also indicate that Appellee was not entitled to special consideration because performance during the extended completion period was more costly (other than Appellee's possible right to seek equitable adjustment).

The Oregon courts have likewise held that substantially increased cost of performance due to delays or other unforeseen factors does not excuse such performance.

Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209 (1905).

Pengra v. Wheeler, 24 Or. 532, 34 Pac. 354 (1893).

Dermott v. Jones (Ingle v. Jones)
2 Wall. (U.S.) 1, 17 L. Ed 762.

Columbus R. Power & L. Co. v. Columbus, 249
U.S. 399, 63 L. Ed. 669, 39 S. Ct. 349, 6 A.L.R. 1648

Anderson v. Adams, 43 Or. 621, 74 Pac. 215
(1903).

Hoskins v. Powder Land & Irr. Co., 90 Or. 217, 176
Pac. 24 (1918).
2 Am. Jur. 928 (Sec. 362)

c. Appellee was not excused from performance by virtue of its alleged ignorance and unfamiliarity with railroad relocation work.

Appellee has urged that it should be excused from its obligation to provide the contract requirements of ballast because it was not engaged in the railroad business, was unfamiliar with the operation and could not determine the ballast requirements for itself in advance of the substantial completion of Part B of the General Contract (R. 56, 67; Pl. Ex. 2-e; Def. Ex. 2). This contention lacks force because both Appellee and Appellant examined the site. Furthermore, the evidence clearly shows that the job conditions were such that experienced railroad builders could not determine ballast requirements accurately in advance of contract performance requirements.

Appellee is estopped to assert its ignorance of the conditions of the job because it is bound by the following provision of the General Contract:

“GC-3. Site Investigation and Representations. — The contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads, and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during the prosecution of the work and all other materials upon which information is reasonably obtainable and which can in any way affect the work or the cost thereof under this contract. The Contractor further acknowledges that he has satisfied himself as the character, quality and quantity of surface and sub-surface materials to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to acquaint himself with all the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work.” (Def. Ex. 1, page GC-1).

See:

Upton v. Tribilcock, 91 U.S. 45, 23 L. Ed. 203.

Danciger Oil & Ref. Co. v. Ball, (C.C.A. 5th) 54 F. (2d) 908.

Appellee is also bound by the following portion of the sub-contract:

“WHEREAS, Subcontractor has carefully examined the General Contract, and has been furnished plans and working drawings, and has fully informed itself as to the location and nature of the work, climate, conditions, terrain, nature and size of vegetation on the site, existing structures, location and general availability of water, fuel and power, size, type and availability of equipment required to perform the work; and other matters of local nature which might affect the cost of the work; and desires to perform, in accordance with the best engineering practices, that portion of the work described below to conform to the specifications and working drawings of the General Contract:...” (Def. Ex. 2, pages 1, 2). ..

Appellee in fact visited the site of the job and studied the conditions of the job (R. 61, 89).

III. APPELLANT WAS UNDER NO OBLIGATION TO NOTIFY APPELLEE OF THE QUANTITY OF MATERIAL TO BE STOCKPILED

The Court has found that it was the “intention, agreement and understanding of the parties” that Appellee would be furnished with final quantity requirements so that Appellee could reasonably supply the required stockpile within the period contemplated by the subcontract and that Appellant failed to give Appellee the information. The Court further found that Appellee was without fault or neglect in stockpiling the

the quantity which was insufficient to satisfy Appellant's requirements. (R. 27-28).

Appellant submits that there is no sound basis for these findings nor is there to be found any competent or satisfactory evidence to support the same.

The obligation upon Appellant's part to furnish all ballast material required for the work is spelled out in the sub-contract and has been discussed in the forepart of this brief. In order to find a duty upon Appellant's part to notify of quantity, it is necessary to find some modification of the written agreement, inasmuch as no requirement of notification is found in the writing, either upon the part of the Army Engineers in the prime contract, or upon Appellant's part in the sub-contract. Upon what evidence must the Court have based these findings?

(a) The alleged oral conversations at Pasco.

Marland Curtis, of Appellee, testified that L. W. Huncke, of Appellant, about April 1, 1951, during negotiations leading to the execution of the sub-contract, assured Appellee that he would advise of the final quantity so that it could be stockpiled on time (R. 56). Mr. Curtis admitted that the contract did not contain any such provision but said that "it was agreed prior to the signing of the contract and was substantiated in a letter" (R. 70-71). David E. Thompson, of

Appellee, testified that it was his "understanding" that Appellant was obligated to notify Appellee of quantity requirements but that he did not consider whether it was a matter of courtesy or commitment (R. 111-114).

At the meeting, on or about April 1, there were present Mr. Curtis, Mr. Thompsen and Mr. Huncke. (R. 110). Mr. Huncke, of Appellant, flatly denied that any such representation was made (Record 141).

"ORS 41.740 -Parol Evidence Rule. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put issue by the pleadings or where the validity of the agreement is in fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term agreement, includes deeds and wills as well as contracts between parties."

ORS 42.220, referred to in the foregoing section, relates to the construction of an instrument and authorizes the submission of evidence of the circumstances under which it was made, including the situation of the subject in the parties in order that the judge may be

placed in the position of those whose language he is interpreting. Here, however, there is no ambiguity as the contract is completely silent as to notification of quantity.

“ORS 41.350 - Conclusive Presumptions. The following presumptions, and no others, are conclusive: (3) The truth of the facts recited from the recital in a written instrument, between the parties thereto, their representatives or successors in interest by a subsequent title; but this rule does not apply to the recital of the consideration.”

In an Oregon case, *American Contract Company v. Bullen Bridge Company*, 29 Or. 549, 46 Pac. 38, damages were sought for an alleged breach of contract. Defendant entered into a contract with the City of Portland under which it agreed to furnish the necessary labor and materials for the construction of a bridge across the Willamette River. The specifications demanded crushed rock for the concrete filling to be used in the piers supporting the structure and Defendant represented to Plaintiff that it would require for such purposes between 3,500 and 4,000 cubic yards of crushed rock. Plaintiff agreed to supply the quantity required and delivered 638 yards but Defendant refused to accept any more of the rock. The written contract, however, consisted of an exchange of letters which specified only that Plaintiff would furnish crushed rock on scows at the bridge site for \$1.35 per cubic yard. The Defendant replied that the proposal was accepted providing that the crushed stone was to be

acceptable to the engineer in charge. The Court observed that this did not constitute an undertaking on the part of either party to do anything except to pay and accept \$1.35 per cubic yard for crushed rock and that there was no obligation to deliver or accept any given quantity of material. The Court added that the acceptance of a quantity of the rock clearly showed the contract existed and that while the rule of law is subtle that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid instrument that the rule does not apply in cases where a part only of the contract is reduced to writing. The Court quotes from *Church v. Proctor*, 66 Fed. 240 where an exchange of letters constituted an agreement between Church to furnish fish to Proctor for the remainder of the calendar year at \$1.00 per barrel and Proctor agreed to pay the purchase price therefor. It was contended that the written contract did not constitute the entire agreement between the parties and evidence was introduced tending to show that Church had agreed to deliver at least 100 barrels of fish each day. The Court said that the writings, taken together, constituted a complete legal engagement and that evidence of an express oral agreement between the parties at an earlier day was incompetent for the reason "that it reads into the written contract an element not necessarily a part thereof." The Court added that the writings constitute one of those common agreements where one person agrees to supply for a stated price and another person agrees to buy, all the articles in a certain line required

for his family use or for his business during a certain period, that such a contract is not indefinite for the reason the requirements may be approximately known and the quantities are to be determined by the reasonable demands of the family or the business. The Court added that by the terms of the contract expressed in writing, Church in effect agreed to deliver and Proctor in effect agreed to receive such quantities of fish as might be reasonably required by his business to be delivered and received during the period and at the place and price designated in the contract, that Proctor was not required to receive and Church was not bound to deliver more than was reasonably required by the business to which the contract had reference, that from the nature of the subject matter to which the contract related the quantity was necessarily uncertain, that Proctor's requirements were subject to fluctuations incident to the season and demands of the market and Church's catch was subject to weather and other elements of uncertainty. The Court added that the contract was complete on its face and evidence of any prior oral agreement to deliver daily a specific quantity of fish was inconsistent with its meaning and therefore incompetent.

Here the contract (Def. Ex. 2) was complete and left nothing to be implied.

In Sund & Co. v. Flagg and Standifer Co., 86 Or. 289, 168 Pac. 300, we find the Court stating that:

"Having concluded that parol evidence cannot

be employed to add a term to a written contract unless it appears from an inspection of the writing interpreted in the light of the circumstances under which it was made, the situation of the subject of the instrument and the parties to it, that the writing is incomplete, it yet remains to determine whether the documents presented here are complete contracts. Turning to the writing signed by the Plaintiffs, it will be seen that the Sund partners agreed to do the construction work between certain stations and the Defendant agreed to pay certain prices for certain kinds of work. It is true that the first paragraph refers to a profile, directions of the Defendant, and rules, specifications and instructions given by the Chief Engineer of the Silver Falls Timber Company, but these provisions relate to the manner of performing the work and are no longer of any moment for the reason that the work has been completed in the manner agreed upon. Every element necessary for complete contract is found in the writing. Not a word can be found in the instrument which contains the slightest suggestion that the parties agreed that they would be bound by the final estimates of the Chief Engineer. The writing is entirely silent upon that subject. It may be true that contracts with station men usually contain the stipulation contended for by the Defendant but the answer is that this instrument does not contain such a stipulation. The parties chose to reduce their oral agreement to writing and upon inspection the document appears to contain a complete contract. The prior oral agreement made in September, 1912, may have included the estimates of the Chief Engineer; but if the oral agreement did not embrace such a stipulation, the parties left it out when they reduced the agreement to writing and since the writing now appears to contain a complete contract, the party claiming to be prejudiced is without remedy in this proceeding."

In *Hyland v. Oregon Agricultural Co.*, 111 Or. 212, 225 Pac. 728, we find the following language:

“It is a substantive rule of law that as between the original parties to a contract and their privies, in the absence of fraud, mistake in fact or illegality in the subject matter of the contract, where the parties have entered into a contract which is complete in itself and which has been reduced to writing, it is ‘conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing’; and that parol evidence, that is, evidence extrinsic to the writing itself, is inadmissible for the purpose of adding to, subtracting from, altering, varying or contradicting the terms of the written contract or to control its legal operation or effect, and that all oral negotiations or stipulations between the parties preceding or accompanying the execution of the written contract are regarded as merged in it: (Citing authority).”

This rule is further enunciated in the Oregon case of *Webster v. Harris*, 189 Or. 671, 22 Pac. (2d) 644. In this case, the agreement was as follows:

“Wren, Oregon, March 7, 1946.

Gerald Harris will sell four million feet of logs, delivery at rate of 1-1/2 million feet per year, to be delivered to M. M. Webster’s sawmill located at Harris Station.

M. M. Webster will buy said logs at market price, or woods run ceiling price and pay for said logs by lumber scale the tenth of each month for lumber marketed the previous month.

Seller may change from pay on lumber scale to

pay on log scale. Logs would be sealed as delivered at mill in lengths 16 to 56 feet long.

M. M. Webster
Gerald Harris”

Plaintiff Webster sought damages for the breach of the contract, alleging that the Defendant orally agreed that the logs referred to in the writing were to be cut from a particular tract of land belonging to the Defendant and that from such tract the Defendant cut and deliver 300,000 feet of merchantable logs but refused to deliver any more logs from the particular tract although there remained some 3,700,000 feet of good merchantable timber thereon. Plaintiff alleged he had performed his part of the contract to date and was ready, willing and able to perform the remainder but by virtue of Defendant's breach, he had suffered damages for which he asked judgment. Demurrer was interposed to the complaint which was overruled and the chief assignment of error is the overruling of the demurrer. Defendant contended that the original written agreement between the parties constituted an integrated contract and that as between the parties thereto, it should be conclusively presumed in the absence of fraud, mistake of fact, or illegality in the subject matter, that the writing contained the whole engagement of the parties. The Court states:

“Consideration of the language and of the written agreement leaves no doubt as to the intention of the parties. Defendant agreed to sell and Plaintiff to buy four million feet of logs. Time and place of

delivery, specifications as to length of logs and prices and terms of payment are all specified. The parties have raised no question of mistake or imperfection in the writing. The writing, in our opinion, was a completely integrated contract. The alleged oral agreement pleaded by Plaintiff conflicts with and contradicts the written contract. Under the latter, the Defendant had the right to fulfill his obligation by delivery of logs from any source available to him from time to time as deliveries were due. The oral agreement would have confined him to one particular source of logs”

“The written contract appearing on its face to be complete, and no issue having been made respecting its validity, or that it embodied a mistake or imperfection, it is to be considered as containing all of the terms of the agreement, and no evidence thereof was admissible between the parties other than the writing itself.”

To the same effect is the case of *Craswell v. Biggs*, 160 Or. 547, 559, 560; 86 Pac. (2d) 71.

It is admitted by Appellant that no objection was made to the testimony of Mr. Curtis concerning the alleged oral conversations at Pasco. In *Taylor v. Wells*, 188 Or. 648, 217 Pac. (2d) 236, the Court states that all of the evidence relating to the negotiations and agreement between the parties was admitted without objection but that it was contended by Plaintiffs on appeal that since the terms of an option were reduced to writing, parol evidence was inadmissible to vary or contradict its terms. The Court states that:

"The rule which prohibits the modification of a written contract by parol evidence (Section 2-214, O.C.L.A.) 'is not one merely of evidence, *but is one of positive or substantive law* founded upon the substantive rights of the parties.' (Citing authority). Evidence properly falling within the inhibition of the rule does not become admissible merely because it has probative value or is not objected to. (Citing authority). It is said in 32 C.J.S., Evidence, Section 863, that there is a conflict of authority as to whether parol evidence which is inadmissible because it varies or contradicts the writing, but which has been admitted without objection, must on the one hand, be considered and given its due effect, or on the other hand, must be disregarded, in the trial court.

The Oregon court goes on to state:

"The weight of authority supports the rule that such evidence should be disregarded. Especially is this true in those jurisdictions where it is held that the parol evidence rule is one of substantive law and not one of evidence merely. (Citing authority)".

The documentary evidence in this case strongly indicates that there was no oral agreement made at Pasco. The only testimony that there was such an agreement was that of Mr. Curtis. Mr. Thompson, employed by Appellee, only testified to his understanding and Mr. Huncke of Appellant flatly denied that such a conversation had ever taken place. The contract between the parties was executed long after the date of the Pasco conversations and after a proposed draft submitted by Appellant to Appellee had been returned with suggested modifications which were all made by Appellant.

There is no mention of the alleged oral agreement in any of the correspondence of the parties and was first mentioned and asserted by Appellee during the course of the trial.

The Army Engineers, in the prime contract, indicated considerable caution in expressing the amount of ballast material required indicating that the figure of 56,000 cubic yards was an estimate only and that Appellant would be required to furnish more or less ballast material as the occasion might require. Appellant, in turn, exhibited caution in writing its sub-contract and imposed the same obligation upon the sub-contractor, Appellee, that was imposed upon Appellant as the prime contractor with the government. To hold that Appellant was required to advise as to quantity before the quantity could be ascertained would be imposing a burden upon Appellant which Appellant specifically sought to be and was relieved of by the execution of the execution of the sub-contract.

b. The letter of September 21, 1951.

On September 21, 1951, L. W. Huncke, of Appellant, addressed the Job Superintendent of Appellee concerning a number of matters, the last paragraph of which is as follows:

“We appreciate your efforts to complete this work within the time allowed and I assure you that we will cooperate and give you any help which we can.

We have, as yet, not made any calculations of the amount of ballast required other than the quantity as set out in the specifications of 56,000 cubic yards of ballast material. I have, however, requested that Mr. Salm and Mr. McDowell recalculate these quantities so that we can give you an accurate determination of the requirements for the work. This will be furnished you within the next two weeks.”
(Pl. Ex. 2-b)

The parties had engaged in several conversations concerning the amount of ballast required (R. 46). This letter, however, was in response to the following question proposed by Appellee in its letter to Appellant of September 14, 1951 (Pl. Ex. 2a).

“We desire to know if you contemplate changing the contract quantity for production of ballast. Unless we are advised otherwise, we shall assume the proper quantity of ballast to be produced at this time is the equivalent of 56,000 cubic yards as measured by car measurement.”

As a matter of fact, an honest effort was made upon the part of Appellant to give a more accurate estimate of the quantity required than that which was contained in the government contract. (Def. Ex. 4-d; 4-g; 4-h; 32; 33). In fact, Mr. Huncke estimated the quantity at 64,000 yards (R. 153). Over the strenuous objections of counsel, Mr. Huncke was permitted to testify that an effort was made to assist Appellee in obtaining advance information as to the amount of material which would be required for the job but that they were unable to reach a satisfactory or accurate determination of the

amount as the result of their investigation and that it was decided after various calculations and conclusions had been drawn that the matter of quantity was indeterminate at the time (R. 147).

On December 3, 1951, Appellant wrote Appellee as follows:

"I am sure that by the terms of our agreement, that Curtis Gravel Company is obliged to produce all ballast material required, irrespective of the quantity needed. It is our thought that a very careful check of the quantity of material required might reveal an error in the specified quantity, and as a matter of courtesy, we intended to call any such obvious error to your attention . . .

I am sorry that we are unable to give you any more definite or accurate information, and it is our suggestion that you take off the quantities from the plans and base your production of the material on the quantity which you believe will be required." (Def. Ex. 4-f)

No reply was made to this letter but Mr. Thompson of Appellee considered that it was answered by his letter of April 5, 1952 (R. 114; Pl. Ex. 2-e). In the letter of April 5, Mr. Thompson referred to his inquiry of September 14, the reply of September 21, the further inquiry of Appellee of November 24 and Mr. Huncke's letter of December 3, all 1951. He states:

"We are not railroad contractors and have no experience in the application of ballast and the amount of shrinkage, loss and waste pertinent there-

to. Subsequently we are unable to make a close determination from the plans. We recognize that we are obligated to maintain a plant for the production of ballast for the life of the original contract, which we did, however, our plant equipment without shovel and hauling equipment rents of approximately \$40.00 per hour which should make it quite obvious we cannot maintain a plant at the project indefinitely without building up a considerable sum for additional reimbursement. It is our opinion that we cannot reasonably be expected to make an exact estimate of the amount of ballast required. It is our further opinion that we did everything possible to obtain the final quantity of material that your organization was obligated to provide this information inasmuch as you established a completion date for ballast much earlier than the original contract completion date. It is also pointed out that we made approximately 4,000 cubic yards of ballast in addition to the contract quantity at the risk of receiving no payment for this material.. It is now our opinion after reviewing the situation carefully that we are not obligated to produce any additional ballast."

It is interesting to note that Appellee's crushing plant remained at the site until March 6, 1952 (R. 167); also, that Appellee was never required to place a crushing plant on the job and that Appellee's obligation was to produce or to furnish crushed stone ballast meeting the specifications in railroad cars, and that the material could have been purchased elsewhere and brought to the job (R. 135).

As the prime contract with the Government required the production of a sufficient quantity of ballast material to perform the work, regardless of quantity, and as

the sub-contract between Appellant and Appellee required Appellee to furnish a sufficient quantity of ballast material to complete the work, whatever that quantity might be, how then is the notification of the quantity of material required a part of the contract? The only answer could lie in the letter of September 21, 1951 (Pl. Ex. 2-d). Certainly, if Appellant could ascertain the quantity required, Appellant would have been happy to furnish that information to Appellee, but on the other hand, if that information could not be developed. Appellant was under no obligation to furnish it. (Pl. Ex. 1). The testimony before the Board of Claims and Appeals of the Army Engineers, is illuminating in this regard and a perusal of that document will disclose that the amount of ballast material which was used upon the job varied materially from the theoretical requirements of the job and that reason for the larger quantity of material used is a matter of pure speculation.

We might speculate upon the result if Appellee had manufactured, for example, 20,000 cubic yards of ballast material which was not used on the job. It can be assumed that Appellee would have desired to receive payment for the surplus ballast material manufactured even though Appellant could have found no use for it.

It therefore appears that the assumption of the burden of producing the required quantity of ballast material was by the sub-contract imposed upon Appellee.

Long after the execution of the sub-contract, Appellee sought to relieve itself of this burden by constantly making inquiry of Appellant and that Appellant was not in a position nor could Appellant place itself in a position to give this requested information.

The letter of September 21, 1951 (Pl. Ex. 2-b) constitutes a gratuitous offer upon the part of Appellant and, Appellant, upon learning that it would be impossible to give a definite quantity, was unable to advise Appellee.

The letter of September 21, 1951 did not constitute a modification in any respect of the sub-contract between Appellant and Appellee.

“Generally speaking, the sufficiency of the consideration for the modification of a contract seems to be determined by the rules that govern the sufficiency of the consideration for an original contract. Thus, the doing by one of the parties of something that such one is not legally bound to do is undoubtedly a sufficient consideration for the other’s promise to modify the terms of the contract. Any new consideration is sufficient.” 12 Am. Jur. 988, Section 410.

This principle was recognized in *Booth Kelly Lumber Company v. Southern Pacific Company*, 183 Fed. 902, decided in this Court in 1950, holding that a modification of the contract in that case was actually supported by a true and valid consideration.

In the case of *Cameron v. Edgemont Investment Co.*, 149 Or. 396, 4 Pac. (2d) 249, damages were sought for breach of a contract for the sale and purchase of real property which Defendant agreed to sell and Plaintiff agreed to buy at a price certain, the contract containing a provision that a concrete pavement 18 feet wide should be laid in front of the lot and a city sewer installed to serve said lot, all on or before October 1, 1928. After the contract had been executed, a typewritten slip initialed by Defendant and Plaintiff was added to the contract to the effect that when the city should install the sewer, the Defendant would pay for the same and the words which obligated the Defendant to construct the sewer were deleted from the contract. The lower court held that the modification of the contract with reference to the sewer was void for lack of consideration and the Oregon Supreme Court affirmed the decision stating that

“a modification of a contract being a new contract, a consideration is necessary to support the new agreement, as for example, where it is to extend the time for performance or payment or to release one of the parties from performance. Although some cases hold that no new consideration is necessary, the theory being that the original consideration attaches to and supports the modification, such cases are criticized in *Shriner v. Craft*, 166 Ala. 146 (51 SO. 884, 28 L.R.A. (N.S.)450, 139 Am. St. Rep. 19) where the Court said: ‘While there are some expressions in the cases which seem to dispense with the necessity of a consideration to be a modification of contract, yet a modification can be nothing but a new contract and must be supported

by a consideration like every other contract. *George v. Lane*, 80 Kan. 94 (102 P. 55); *Weed v. Spears*, 193 N. Y. 289(86 N. E. 10). Mutual obligations assumed by the parties at the time of the modification without doubt constitute a sufficient consideration. If one of the parties does not assume any obligation or release any right, then the promise by the other is a nudum pactum and void: *Grath v. Mound City Roofing Tile Co.*, 121 MO. App. 245 (98 S.W. 812).

“In the present case the Defendant, by the original contract, plainly agreed to install a sewer at its own expense to serve the lot. In the proposed modification nothing is added to the promise of Defendant. The modification purports to release the Defendant from its obligation to install the sewer on or before October 1, 1928, which was a valuable right in favor of the Plaintiff. This was proposed to be released without any consideration or benefit passing from Defendant to Plaintiff, or any detriment to the company. The proposed modification was to change the time of installation of the sewer from the definite date of October 1, 1928, to an indefinite, visionary promise to pay for the assessments for the sewer, if it were ever constructed by the city, which promise was not worth one farthing to Plaintiff. There was mutuality expressed in the rider.”

The Court goes on to say that it is a rule that a promise to pay one for doing something he was under a prior legal duty to do is not binding for want of a consideration.

To the same effect is *Craswell v. Biggs*, 160 Or. 547, 86 Pac. (2d) 71, holding that a written instrument may be modified by a subsequent parol contract, but evidence

must be clear, convincing and conclusive and must be predicated upon a legal and valid consideration.

In *Smith v. Phillips Pipeline Company*, 128 F. Supp. 61, recovery was sought for a pipeline and Plaintiffs urge that they are entitled to receive more money than the amount called for in the writing for the reason that inclement weather, not within the contemplation of the parties, was encountered during the pipeline work. Plaintiffs contend that the Defendant assured them that they would lose no money if they continued the work called for in the original written agreement during the unforeseen inclement weather. The Court found that the agreement was unenforceable due to lack of consideration running to the promisor. The Court pointed out that the contention was made that the consideration was the detriment suffered by the Plaintiffs in continuing to lay pipe in conformity with the written specifications at a time when weather conditions were extremely adverse but that "it is fundamental that the discharge of a promise previously made and for which the promisor is legally obligated cannot stand as a new and separate consideration for a subsequent agreement. This principle is directly applicable to the instant case. All of the work done by Plaintiffs was work specifically called for in the written contract."

The letter (Pl. Ex. 2-b) constitutes a mere offer upon the part of the Appellant to extend aid to the Appellee in the circumstances. Events prove that no one

was able to predict at the time the amount of ballast required. Appellant on December 3, 1951, by letter (Def. Ex. 4-f) indicated that the terms of the agreement bound Appellee to produce the material required, regardless of quantity. Appellant indicated in that letter it was unable to give any more definite or accurate information.

Appellee chose to disregard the warnings which Appellant gave Appellee, although Appellee continued to leave its plant at the site until about March 6, 1951. Appellee refused to make any effort whatever to procure ballast material from other sources in order to fulfill its contract requirements but chose to stand on what Appellee stated were its legal rights.

It is submitted that the competent and substantial evidence necessary to a finding that it was the agreement of the parties that notice of final quantities would be given is not present in this case. The disputed conversations at Pasco cannot be considered in the light of the Oregon statutes and decisions and the indication that the information with respect to quantities would be furnished would constitute a modification of the contract, wholly unsupported by any consideration whatever.

IV. APPELEE IS NOT ENTITLED TO INTEREST

The trial court awarded interest upon the sum found to be due by Appellant. The Oregon statute, ORS 82.010, allows interest at 6% per annum upon:

“(a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.

(c) Money received to the use of another and retained beyond a reasonable time without the owner’s express or implied consent.

(d) Money due upon the settlement of matured accounts from the day the balance is ascertained.”

The foregoing are the only provisions of the code section which might have possible application.

There are only two types of interest, namely, contractual interest or interest as damages which are recognized by law. *City of Seaside v. Oregon S. & C. Co.*, 87 Or. 624, 634. Contractual interest involves either conventional interest (where parties have agreed to pay interest at a specific rate) or legal interest (where parties have contracted for payment of interest but have not specified the rate). Interest as damages has been defined as the compensation awarded as damages for the withholding of moneys and is based upon the theory that the injured party could have employed the funds to a profit during the period of withholding. 17 OLR 51.

The sub-sections of ORS 82.010 cited above contemplate interest as damages. As the law review cited above points out, Oregon early adopted the conservative rule that interest as damages would be awarded only where the principal sum is liquidated and refused the New York rule which allows interest when, although the principal sum is unliquidated, it might be ascertained by calculation with reasonable certainty by reference to existing market values. In following the rule regarding interest as damages the cases indicate that damages are to be deemed liquidated, in contract cases, only for the breach of a promise to pay a definite sum of money and in tort cases for the wrongful acquisition or detention of a sum of money.

The Restatement of the Law of Contracts, Section 337, adopts both the conservative rule, the New York rule that interest will be allowed where value is ascertainable by mathematical calculation from a standard fixed in the contract or from established market price and cites a third, that where the contract is broken and is a kind not specified under the conservative rule, interest might be allowed as justice requires it. Thus, the Restatement would permit interest as damages for the breach of a contract of almost any kind or nature.

A prerequisite to the recovery of interest as damages is that the sum of money detained after breach be a definite sum. In 1906, the Oregon Court deviated somewhat by permitting interest to be recovered in a case where wheat

was delivered to a warehouse and either like wheat was to be delivered to the depositor or paid for in cash at market, but the warehouse was burned and the wheat was destroyed. Interest was allowed on the value of the wheat from the date of demand. It is pointed out here that the commodity had a definite market value from day to day so that the value was very easily ascertainable. *Savage v. Salem Mills Co.*, 48 Or. 1; 85 Pac 69. Interest on matured accounts appears to be allowable from the day the balance is ascertainable but there are four prerequisites to recovery under this provision: there must be a mutual account, the account must be matured, the matured account must be settled and it must be shown that the Defendant failed to pay the balance thus ascertained. 17OLR 51.

The Court has cited *Public Market Co. v. City of Portland* 171 Or. 522, 625 (R. 24) as the basis for the allowance of interest. Here the city contracted to purchase a building to be constructed for use as a publicly owned market and the purchase price was to be paid out of a special fund to be raised by sale of public utility certificates. After the building had been constructed and other conditions met, the city completely repudiated the entire transaction, having made no effort to create the special fund by the sale of the certificates. The Oregon Court held this repudiation wrongful and without justification. The Court points out that the failure to perform the duty of creating the fund was a tort to which the city had to respond and found the measure of damages to be the contract price less the value of the property and

allowed interest, thus adopting the New York rule that the sums were readily ascertainable by resort to market values. The city contended that the damages were unliquidated but the Court held that the 'pecuniary amount was either ascertained or ascertainable by simple computation or by reference to generally recognized standards such as market price, and where 'the time from which interest, if allowed, must run, - that is, a time of definite default or tort-feasance, - can be ascertained.' The Court held both elements to be present.

In 1944, only a short time after the *Public Market* case had been decided, the Oregon Court rendered its decision *In re McKinney's Estate, Tracy v. Pioneer Trust Company*, 175 Or. 28; 149 Pac. (2d) 980, 151 Pac. (2d) 459, where the Court stated that as the demand was based on an implied promise to pay the reasonable value of services there was no understanding as to the value thereof, that since there was no agreement as to the date the compensation should be paid, that since no demand was made for payment, that as the services were of such a nature that their value was not ascertainable by computation or by reference to well known standards of value, and since the claim was subject to offset, interest upon the claim was not allowable. The Court stated:

"We do not consider the rule in *Public Market Co. v. City of Portland* . . . as to the allowance of interest, controlling here, because it is based upon an entirely different set of facts."

Thus, we find the Oregon Court leaving the strict conservative rule and adopting the New York rule but making its application quite limited in its latest decision on the subject. In *re McKinney's Estate*, *supra*. The Oregon Court has not adopted the third and most liberal rule of the Restatement.

This situation does not fall within the rule with regard to the settlement of matured accounts nor money received to the use of another and must be limited to the sub-section of the code relating to 'all moneys after they become due'.

The facts here do not meet the test as laid down by the Oregon Court.

We have earnestly contended that Appellee is not entitled to judgment for the amounts withheld due to extra costs of ballast material involved by Appellee's breach of its contract. However, in the event this Court does not accept our position, then we contend that interest is not allowable as the situation does not come within the purview of the *Public Market* case, *supra*. The claim of Appellee involved Eleven Thousand Seven Hundred Forty-Two and 77/100 Dollars (\$11,742.77) composed of two items, namely, the amount withheld for extra costs of material and the amount expended by Appellee in moving cars for loading. Appellant, on the other hand, contended that Appellee was responsible for moving cars, that Appellant was compelled to take over by

virtue of Appellee's refusal, expended One Thousand Eight Hundred Seventy Four and 88/100 Dollars (\$1,874.88) in so doing and was entitled to payment therefor (R. 6).

The Court found that the moving of cars was indeed Appellant's responsibility and refused to allow recovery with respect to that part of the demand (R. 31).

The award of interest upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94) (R. 33) was based upon a claim of Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars (\$14,582.92) which Appellee contended was owing by Appellant as the result of a claim filed with the Army Engineers by Appellant (R. 10). The Court found that Appellant was entitled to retain 5% of the award for Appellant's administrative expense and 1% for Appellant's bond costs incurred (R. 31).

In neither of these instances could resort have been made to the contract to obtain the standard by which the sums due could have been liquidated. Nor could any reasonable market value have been applicable nor could the result have been reached by mathematical calculation. Appellee quit moving cars in the midst of the job, asserted the contract for loading the material in the cars did not involve moving cars and left Appellant to move the cars if the material was to be loaded. This was rather highhanded and the Court found the

obligation to be that of Appellee. The claim for ballast material was merged in and was a part of the claim for for moving cars and Appellee was adamant with respect to payment of the entire claim.

The claim for Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars (\$14,582.92) made by Appellee entertained no provision for handling and other charges incurred by Appellant in processing this claim. The award was less than the amount sought.

Thus, both of these claims were subject to reductions not ascertainable in the circumstances and were therefore not liquidated claims.

The sub-contract (Def. Ex. 2) contains the following paragraph:

“16. Subcontractor agrees to submit to the Contractor each month invoices for the payment of units of work performed by Subcontractor during the preceding monthly period, as determined and substantiated by estimates of the Principal, itemized in such form and supported by such evidence as may be required by the Contractor, or by the General Contract. Contractor, within thirty (30) days after presentation of such invoices and approval thereof by Contractor, agrees to pay Subcontractor a sum equivalent to ninety percent (90%) of such work performed during such monthly period. Upon completion of the sublet work by Subcontractor, and after acceptance by Principal of the sublet work described in specifications and working drawings, and receipt of a Release Agreement executed by

Subcontractor, to pay Subcontractor the balance then due Subcontractor under the terms hereof within thirty (30) days.”

Under this provision, Appellant was entitled to withhold ten percent (10%) of the total sums due under the sub-contract until completion of the work required of Appellee, the acceptance of the work by the Army Engineers and the receipt of a release of all claims of Appellee against Appellant. Such a release has never been given by Appellee.

Appellant and Appellee attempted to negotiate a settlement of all disputes. At that time, Appellant offered to deliver to Appellee the sum of Fourteen Thousand Five Hundred Eighty-Two and 92/100 Dollars (\$14,582.92) in the event that the release called for in the subcontract would be given and indicated Appellant had always been ready to deliver up the sum under the conditions expressed. Appellant also requested an indemnification as provided in Paragraph 6 (Def. Ex. 2). Appellant's prime contract was subject at the time of the trial of this case to audit and clearance by the General Accounting Office of the United States, which left Appellant vulnerable to disapproval of the amounts paid under the claim by the Army Engineers and subjected Appellant to reimbursing the government therefor (R. 154-159, 201-207).

Such were the conditions which faced Appellant in settling its dispute with Appellee. How Appellant at that time could have paid the amounts found by the Court to have been due Appellee is beyond comprehension.

CONCLUSION

For the reasons stated herein, the judgment of the District Court should be reversed with respect to the two parts thereof from which this appeal is taken.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

APPELLANT'S REPLY BRIEF

*Upon Appeal from the United States District Court
for the District of Oregon*

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APPELLANT'S REPLY BRIEF

*Upon Appeal from the United States District Court
for the District of Oregon*

1. The sub-contract determines the obligations of the parties.

Both parties agree that the sub-contract dated June 10, 1951, (Def. Ex. 2), determines the respective obligations of the parties.

The sub-contract sets forth that Appellee Curtis carefully examined the general contract (Def. Ex. 1),

received all of the plans and working drawings, was fully informed of the location and nature of the work, of the climate, conditions, terrain, nature and size of the vegetation existing structures, location and general availability of water, fuel and power, the size, type and availability of equipment to perform the work and other matters affecting the cost of the work. Mr. Curtis visited the site and studied conditions before signing the agreement. (R. 61). In fact, Mr. Curtis testified that he was familiar with all of the terms of the general contract. (R. 66).

Mr. Curtis agreed, among other items, to perform Part B, Item 3 b, of the prime contract calling for furnishing of ballast material at a price of \$2.20 per cubic yard. This section recites:

“Estimated quantity, 56,000 cubic yards. The quantities listed above are estimates only. The subcontractor will be required to complete the work specified above in accordance with this contract and at the price or prices whether it involves quantities greater than or less than the above shown estimates . . .”

The above provision makes it clear that Curtis was obliged to provide all ballast necessary to complete the job. In Appellee's brief, Curtis seeks to avoid this obligation on the grounds that Curtis was not furnished with quantity requirements until after the original date was extended by change orders of the Army Engineers because of delays in site preparation by other contractors

and sub-contractors, which were not the fault of either Appellant or Appellee. Appellant did give Appellee timely notice of ballast requirements within the extended contract period as soon as site conditions permitted. (Def. Ex. 4-0, 5a, 5b).

It is obvious that large construction jobs in remote areas may entail delays. Such delays, without fault, are in the minds of the parties, and contractual provisions for them are quite customary. The prime contract contemplated them and contains provisions expressly governing extensions of time of performance. (Def. Ex. 1).

The sub-contract incorporates the provisions of the prime contract by reference in plain and unambiguous language. Section 19 of the sub-contract, (Def. Ex. 2), provides:

“All provisions of the original contract and the specifications and working drawings are included as a part of this sub-contract the same as though written in full herein.”

Curtis understood that the sub-contract incorporated the provisions governing extensions of time of performance set forth in the prime contract. Delays in site availability which were not the fault of Appellant or Appellee also precluded Appellee from the furnishing aggregate under Part A of the prime contract within the time originally specified in the contract. Nevertheless, Curtis continued to provide aggregate far in excess

of estimated quantities during the extended time for performance provided by change order. (Def. Ex. 8A).

Any other conclusions would not make business sense, and would make it difficult for contractors and sub-contractors to bid and perform large government construction contracts. Under these contracts, the United States requires that the prime contractor perform completely notwithstanding changes in specifications, extras changed conditions or requirements, and that allowances for any increases or decreases in a contractor's costs resulting therefrom be determined by the contracting officer for the government with provision for appropriate rights of administrative and judicial review. (Def. Ex. 1, Articles 3, 4, 5C, on pp. 3 and 4 of the prime contract). The business purposes of this clause are to avoid delays and to see that the government will not be stuck with high prices for changes or site delays during the course of the work with the only expensive alternative of bringing in another contractor and his equipment on competitive bid.

The same factors govern the relationships of the prime contractor and the sub-contractor who is performing parts of the prime contract. If the prime contractor were bound by blameless site delays with no recourse other than change orders extending the time of performance, while the sub-contractor were free to walk off the job because of a government time extension for performance, the prime contractor would be at the

mercy of the sub-contractor with the same expensive alternatives which the government eliminated in the enumerated clauses of the prime contract. The very purpose of Section 19 of the sub-contract incorporating all provisions of the prime contract by reference is to put the sub-contractor, the prime contractor, and the United States government in the same position with regard to innocent delays and changes arising on the job.

The reference in the sub-contract to the provisions, the specifications and working drawings is plain and unambiguous. It was intended to and did incorporate by reference into the sub-contract all those provisions of the prime contract which might be applicable to the sub-contract which Appellee was obligated to perform. Appellee would have the Court believe that reference to the provisions of the general or prime contract was for a particular purpose only, and its citations of authorities are all concerned with the reference made in a sub-contract to the original contract for a particular and specified purpose. There is no such limitation in the case under consideration for it is obvious that the parties intended that the sub-contractor should be bound by all those matters and things contained in the prime contract by which the general contractor would be bound. The Court's attention is called to the language appearing in 12 Am. Jur. 781, Sec. 245, to the effect that:

“Where a contract is executed which refers to another instrument and makes the conditions of

such other instrument a part of it, the two will be interpreted together as the agreement of the parties.”

Myers vs. Strowbridge Estate Co., 82 Or. 29, 160 Pac. 135, and *Wallace vs. Oregon Engineering Co.*, 90 Or. 31, 174 Pac. 156, 175 Pac. 445, are both cases in which the contract referred to an unattached document for a specific purpose only and were thus so limited. Here the sub-contract specifically incorporates all conditions of the prime contract. (Def. Ex. 2, Paragraph 19).

2. The sub-contract was plain and unambiguous.

We submit that the contract is plain and unambiguous and apparently, Appellee has conceded that the alleged conversations at Pasco are not to be considered as evidence in this case, in the event that the sub-contract is plain and unambiguous.

A careful examination of the instrument leaves no room for doubt that notice of quantity requirements is not required. Had such notice been required, the sub-contract would have plainly so stated. Appellant acquainted himself with the project prior to the execution of the sub-contract and was aware of the progress of Appellant's work and that the same was dependent upon the performance by other contractors of their commitments. The Army Engineers computed the theoretical quantity of ballast material to be used and so did Appellant. However, the Army Engineers specifically thrust the burden of determining actual quantity upon Appellant and the latter, in entering into the sub-contract, intended to and did transfer this burden of ascertaining quantity upon Appellee. Nevertheless, Appellee, shortly after beginning the manufacture of ballast, sought to shift this burden of determining quantity to Appellant; Appellee repeatedly, both orally and in writing, requested of Appellant the ultimate quantity of ballast material required. Many delays had occurred in the performance of the contract covering the entire project, and both Appellee and Appellant were

aware of the fact that ballast material could not then be applied. However, Appellant, seeking to be helpful, made an honest and sincere effort to assist Appellee in making a determination, but could arrive at no conclusion and thus could not give Appellee the definite figure demanded at the time of the demand. (Pl. Ex. 2-a, R. 145-147. Appellee also sought to be relieved of the obligation of determining quantity on the ground that it was inexperienced in railroad work although the testimony indicates that Appellee had performed at least two ballast production contracts in connection with railroad work, one for the Milwaukie Railroad and one for the Corps of Engineers (R. 56). Appellant was experienced in railroad work, realized that the exact quantity of ballast material could not be determined in advance of the application, and it was for this reason that the contract between the parties did not provide for advance notice. (Def. Ex. 4-d, 4-g, 4-h, 32 and 33). It is interesting to note from Pl. Ex. 1, the transcript of testimony before the Claims and Appeals Board of the United States Army Engineers that the reason the applied ballast exceeded the theoretical quantity by such a high percentage remains a complete mystery.

Appellee claims that custom and usage dictates that Appellant should give notice as to the quantities required, but to engraft such a provision in the contract by custom, one must find it to be "ancient, notorious, uniform, not opposed to a well settled rule of law, and

not inconsistent with the contract of the parties" *Port Investment Co. vs. Oregon M. F. Insurance Company*, 163 Or. 1, 94 Pac. 2nd 734; *Coxe vs. Heisley*, 19 Pa. St. 243, 25 C.J.S. 78. Appellee failed to prove that there was such a custom in existence at the time of the making of the contract as would meet the requirements set forth by the Oregon Court. Appellee's witnesses speak of their own experience but make no mention of universality of such a custom (R. 50, 78, 109-110). The witness Shotwell did not testify to any history of such a custom, did not state that it was common knowledge and did indicate by his testimony that a provision for notice was usually incorporated in the contract. (R. 78). He further stated that he had never produced ballast material for a railroad job. (R. 82). Appellee's witness Thompson, project Engineer for Appellee, speaks only of his own experience. (R. 109-110). He testified further that if he had known Appellant did not intend to notify Appellee of the quantity, that he would have then referred to the verbal agreement. (R. 114). If the alleged custom were so well known, why would he not have said that he would rely on custom? Is custom so soon forgotten that upon cross examination he would not have remembered the custom which he said he had found in his own experience? Nowhere in the testimony or in the exhibits does it appear that Appellee put any reliance upon the alleged custom. If such a custom existed and met the requirements, namely, that it be ancient, notorious and uniform, and if Appellee did in fact enter into the contract with the intention of incor-

porating such custom into the agreement, it seems apparent that some reliance would have been placed upon custom prior to the filing of the pleadings herein. One cannot find in the testimony any hint that Appellant had knowledge of such custom and there was no testimony to the effect that the custom was so general that Appellant could be presumed to have knowledge of it. "To hold a person bound by a custom it must be shown that the custom is so notorious as to affect him with knowledge of it and raise the presumption that he dealt with reference to it or else that he had actual knowledge of it." 55 Am. Jur. 282.

In *Pickley vs. United States* 46 Ct. Cl. 77, the contractor was employed to perform four jobs for the government and the latter's engineers were to select the points at which work would be done. The contractor was not employing a sufficient staff to do the job in question and the engineers delayed notification to him to begin a job. The government, at the hearing of the case, attempted to prove liability upon the part of the contractor to notify that he was ready to begin. The Court held that the custom could not be imported into the contract, stating that "a custom may be shown to explain a written contract where there is something to be explained. But where a contract does not require the contractor to give notice that he is ready to begin work, it cannot be imported into the contract by custom. *Irs. Co. vs. Wright*, 1 Wall 456, 470; *Barnard vs. Kellogg*, 10 Wall 383, 390, 2 Greenleaf on Evidence,

Sec. 251, 292.”

If Appellee had been able to prove that there was a custom so notorious, general and ancient as to imply knowledge upon the part of the Appellant, such custom would still be of no avail as it is in contravention of the express or implied provisions of the written contract. *Port Investment Co. vs. Oregon M. F. Ins. Co.*, supra.

In the recent case of *Bliss vs. Southern Pacific Co.*, Or. Adv. Sheets, Vol. 66, p 285, at 288, we find the following language:

“The rule is well settled that when a custom or usage is inconsistent with the plain and unambiguous terms of a contract, it cannot be interposed to contradict or qualify its provisions, for in such a case, as here, the terms of the contract are evidence of the intentions of the parties to avoid the effect of such usage or custom. ‘It is sufficient ground for

rejecting the custom that it is excluded by necessary implication.’ . . . Custom, when available to a party, is used in evidence only as a means of interpretation of a contract and not for the purpose of importing new terms into it. *Barnard and Bunker vs. Houser*, 68 Or. 240, 243, 137 Pac. 227. If it were otherwise, Plaintiff’s claim of custom and usage would have the effect of giving him a tenancy in virtual perpetuity if sustained by prompt payment of an annual rental of \$30.00.”

It is assumed that a contract to purchase all re-

requirements for a certain job does not specify the actual quantity required for the reason that the buyer does not intend to assume the burden of predicting quantity. Obviously, price is based upon the questionable nature of the requirements. The Oregon Court, in the Port Investment Co. case, *supra*, set forth the rule at pp 20 and 21 to the effect that "it is also the law that even where a contract is indistinct and uncertain in its terms, it cannot be contradicted by usage: 17 C.J. 511, Sec. 77; *American Lead Pencil Company vs. Nashville C. and St. L. Railway*, 124 Tenn. 57, 61, 134 S. W. 613, 32 L.R.A. (N.S.) 323. It is sufficient ground for rejecting the custom that it is excluded by necessary implication: 27 R.C.L. 173, Sec. 20; *Shaw vs. Ingram-Day Lumber Co.*, 152 Ky. 329, 334, 153 S. W. 431, L.R.A. 1915D 145."

3. Ascertainment of quantity of ballast material.

Appellee contends it was Appellant's obligation to notify of quantity prior to the date upon which Appellee agreed to have furnished the ballast material, contending that in all conversations at Pasco in March or April of 1951, Mr. Huncke, one of Appellant's principals, made an oral commitment to give such notice. The alleged oral commitment was never mentioned in any letter or conversation and Appellant was never reminded of any oral commitment theretofore made. (R. 118-120). The Court's attention is again called to the fact that Mr. Huncke denied ever having made the alleged oral commitment.

Much is made of the completion dated of October 11, 1951, although ballast material was produced by Appellee until December 22, 1951. (R. 50). When inquiry was made as to why work did not cease on October 11, 1951, it was stated that "because the progress of work where the ballast to be used was delayed and there was no necessity of having ballast stockpiled by that date." (R. 50, 125). The crusher was maintained on the premises until late in March of 1952, (R. 122) and Mr. Thompson, the job superintendent of Appellee, who wrote the letter of April 5, 1952, (Pl. Ex. 2), testified that by his letter of April 5, 1952, he was attempting to obtain an exact figure for the production of ballast.

Mr. Huncke testified that Appellant had no objection

to the dismantling of the plant so long as the obligation to produce requirements was met, that Appellant never insisted upon a crushing plant, that the obligation of Appellee was to furnish crushed stone in railroad cars and how Appellee went about performing its contract was really of no concern to Appellant so long as performance was obtained. (R. 135).

The record indicates that the subgrade was prepared by other contractors, the roadway shaping was performed by Appellee, that the roadbed topping, the next step in the progress, was performed by Appellee and that Appellant thereupon distributed ties and rails along the roadbed. After all this was accomplished, the ballast material was placed. (R. 150-152).

Appellee, whose duty it was to load the material into railroad cars furnished by Appellant, was on the job during all of this time and was familiar with the progress of the work. As Mr. Huncke testified, Appellee performed the roadbed topping job and Appellee was actually in a much better position to know the conditions of the subgrade than was Appellant. (R. 147).

We therefore find that Appellee was working at the job site during all of the activity. Mr. Thompson, the superintendent, was at the job site the entire time and Mr. Curtis was at the job site two or three days out of every ten days or two weeks. (R. 82).

The general provisions of the contract provide for

extensions of time. Appellee was acquainted with the fact that Appellant's progress of work was dependent upon Appellant's prompt performance, and, of course, by the prompt performance on the part of Appellee with respect to those parts of the contract which Appellee had undertaken to perform. Appellee well knew that the work was not progressing in accordance with the original schedule and had direct knowledge of the fact that Appellant was unable to assert with particularity the exact quantity of the ballast material to be produced, other than taking off a theoretical measurement which was the estimated quantity set forth in the prime contract. Appellee was actually familiar with all the terms of the general contract, (R.66) anticipated unforeseen difficulties, (R. 68).

Appellee contends that all the cases cited by Appellant concern situations in which the purchaser made his requirements known, but the seller failed to deliver the requirements. As a matter of fact, the cases cited by both parties with relation to this problem are cases in which the contract definitely provided that the supplier would be notified by the purchaser at particular intervals. In our case, however, the contract is silent, and does not provide for such notice. In 77 C.J.S. 908, Sec. 171, we find the following language:

"A provision in the contract for notice of the buyer's requirements must be complied with. Such a provision, being for the sellers benefit, may be

waived by him, but he can not waive the provision to the buyer's prejudice. Also, where a contract for the sale of articles during a specified period of time provides for advance notice by the buyer of the amount required, and no notice is given, but the seller visits the buyer's place of business from time to time in order to keep in touch with the latter's requirements, the buyer is not bound to pay for an amount in excess of his needs, which the seller has manufactured on information supplied from his own observation, without notice from the buyer."

Here the Appellee was as familiar with the conditions which would determine the amount of ballast to be manufactured as was the Appellant.

While the original completion date for the production of ballast material was October 11, 1951, change orders finally extended the time for performance of the contract to August 9, 1952. (Def. Ex. 8-a). Extensions of time for the performance of all parts of the work were made from time to time and Appellee was well acquainted with the fact that change orders were constantly being made extending the time for performance due to unavoidable delays, and it is obvious that Appellee's statement that the prime contract was extended without the knowledge of Appellee is without merit in view of his claim for extra ballast material.

The sub-contract, (Def. Ex. 2), provides at page 6 thereof that "should the contractor take over com-

pletion of this work, the expense of completion shall be deducted from any sums that may then be due or that may thereafter become due sub-contractor by virtue of this agreement."

4. Computation of claim for extra ballast material.

Appellant was obligated to procure the ballast at Springfield and to ship the ballast material from Springfield by Southern Pacific Railway to Jasper, and at Jasper, Appellant's own equipment moved the ballast material to the point where it was to be used upon the re-located portion of the railroad which Appellant had contracted to construct. It is sufficient to say that the parties intended that delivery should be made upon that portion of the railroad which was the subject of Appellant's contract and where the ballast material was to be employed.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed with respect to the two parts thereof from which this appeal is taken.

Respectfully submitted,

KEANE and HAESSLER

Gordon H. Keane

Eric R. Haessler

Virginia M. Riley

1430 American Bank Building
Portland 5, Oregon

Attorneys for Appellant

No. 15830

**United States
Court of Appeals
For the Ninth Circuit**

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED
FEB 13 1958

PAUL P. O'BRIEN, CLERK

No. 15830

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MARTHA JORDAN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

Civil No. 9220

MARTHA JORDAN,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Defendant.

PETITION FOR REMOVAL OF CIVIL CAUSE
FROM STATE COURT

Comes now States Marine Corporation of Delaware, defendant above named, and petitions the above-entitled Court to cause the removal of the above-entitled cause from the Circuit Court of the State of Oregon for the County of Multnomah to the District Court of the United States for the District of Oregon and in its verified petition filed herein alleges:

I.

That on the 17th day of June, 1957, one Martha Jordan, as plaintiff, commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah against your petitioner, States Marine Corporation of Delaware, a corporation, organized and existing under the laws of the State of Delaware, and against no other defendants, wherein, among other things, said plaintiff alleges in her complaint that while her husband, Johnnie Jordan, was

working as a seaman aboard the vessel SS "Cotton State," on or about the 3rd day of January, 1956, and the 17th day of February, 1956, said vessel at the time being owned and operated by your petitioner, he sustained certain personal injuries, which caused plaintiff to suffer loss of her husband's consortium to her damage in the amount of \$50,000.00. Plaintiff further alleges that said damages were proximately caused by both the negligence of petitioner as well as the unseaworthiness of the vessel at the time owned and operated by petitioner. Said complaint as filed in the State Court is numbered 240-355.

II.

A true copy of the aforementioned complaint together with summons as issued by State Court and constituting all process, pleadings and orders served upon your petitioner are set forth in Exhibit "A" of this petition and made a part hereof by reference.

III.

Said summons and complaint as set forth in Exhibit "A," constituting initial pleadings and process in the cause, were served upon petitioner on the 17th day of June, 1957, in the City of Portland, Oregon.

IV.

That now and at all times herein mentioned, your petitioner as defendant in said civil cause is and was a corporation organized and existing under the laws of the State of Delaware and as such was and is a resident and citizen of the State of Delaware.

V.

That said complaint of plaintiff fails to disclose the residence or citizenship of the plaintiff, Martha Jordan. Petitioner alleges upon information and belief that she is a resident and citizen of the State of Oregon.

VI.

That petitioner is entitled to have said cause removed from the State Court to the above-entitled District Court of the United States for the District of Oregon, pursuant to Title 28, U.S.C.C., Section 1441 upon two grounds:

(1) The controversy as set forth in plaintiff's complaint involves a sum in excess of \$3,000.00, exclusive of interest and costs and is between a resident and citizen of the State of Delaware, and a resident and citizen of the State of Oregon.

(2) The subject of the controversy is one within the admiralty jurisdiction of the above-entitled Court and, thus, the jurisdiction of this Court is founded on a claim or right arising under the Constitution, treaties or laws of the United States, if any claim at all exists.

VII.

That petitioner has filed its petition within twenty days from service upon it of initial pleadings or process; has simultaneously with the filing of its petition filed a removal bond as required by law; filed a copy of this petition with the Clerk of the Circuit Court of the State of Oregon for the County of Multnomah and has given notice to the adverse party of said petition and said filings as required by law.

Wherefore, petitioner, States Marine Corporation of Delaware, as the defendant in the aforescribed cause of action, prays that the said cause be forthwith removed to the above-entitled Court.

WHITE, SUTHERLAND AND
WHITE,

/s/ WILLIAM F. WHITE,
GRAHAM, JAMES & ROLPH,
Attorneys for Defendant, States Marine Corporation of Delaware.

State of Oregon,
County of Multnomah—ss.

I, William F. White, being first duly sworn, depose and say: That I am one of the attorneys and proctors of States Marine Corporation of Delaware, a corporation, organized and existing under the laws of the State of Delaware, and that I make this verification for and on behalf of said corporation, the petitioner herein for the reason no officer of said corporation is presently within Portland, Oregon, wherein your affiant has his law office, and that the foregoing petition is true as I verily believe.

/s/ WILLIAM F. WHITE.

Subscribed and sworn to before me this 27th day of June, 1957.

[Seal] /s/ JOHN YERKOVICH,
Notary Public for Oregon.

My commission expires: 7-19-59.

EXHIBIT A

In the Circuit Court of the State of Oregon
for the County of Multnomah

No. 240355

MARTHA JORDAN,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Defendant.

COMPLAINT

Comes now plaintiff and for cause of action against the above-named defendant, complains and alleges as follows:

I

That at all times hereinafter mentioned, defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware with an office and principal place of business in Portland, Multnomah County, Oregon; that at all times herein mentioned said defendant corporation was engaged in the operation of ocean-going ships in interstate and foreign commerce, and among such vessels which were owned, operated, controlled and managed by said defendant corporation was a vessel known as the SS Cotton State.

II.

That on and prior to January 3, 1956, this plaintiff was and now is the wife of Johnnie Jordan, who

was working as a seaman for said defendant corporation aboard said vessel in the capacity of galley utility; that on said date while said Johnnie Jordan was in the course of his employment he was caused to fall in said galley solely due to the unseaworthiness of said vessel and its appurtenances, and the negligence of said defendant corporation, its officers, agents and employees, as hereinafter set forth; that thereafter and while said Johnnie Jordan was in the course of his employment as hereinafter set forth and on or about February 16, 1956, said Johnnie Jordan was caused to fall in said galley solely due to the unseaworthiness of said vessel and the negligence of the above-named defendant corporation, its officers, agents and employees.

III.

That at the time and place of said accident of January 3, 1956, the above-named defendant corporation, its officers, agents and employees, were negligent, and said vessel and its appurtenances were unseaworthy in one or more of the following particulars:

1. Said vessel and its appurtenances were unseaworthy in that the galley floor was not made of non-skid material.

2. Said vessel and its appurtenances were unseaworthy in that a nonskid matting was not used on the galley deck.

3. Said vessel was unseaworthy in that the drains in said galley were plugged or defective, so as to

cause water and debris to be on the deck of said galley.

4. Said defendant was negligent in that the galley floor was not made of nonskid material.

5. Said defendant was negligent in that a non-skid matting was not used on the galley deck.

6. Said defendant was negligent in that said matting was placed upside down on the galley floor.

7. Said defendant was negligent in that orders were given to place said matting upside or wrongside down.

8. Said defendant was negligent in allowing water and debris to be and remain on the deck of the galley.

9. Said defendant was negligent in failing to properly inspect said galley deck and particularly the matting thereon before requiring this plaintiff to work.

10. Said defendant was negligent in failing to warn the said Johnnie Jordan of the highly dangerous condition caused by said matting.

IV.

That at the time and place of said accident of February 16, 1956, the above-named defendant corporation, its officers, agents and employees, were negligent and said vessel was unseaworthy in one or more of the following particulars:

1. Said vessel and its appurtenances were unseaworthy in that the galley floor was not made of non-skid material.

2. Said vessel and its appurtenances were unseaworthy in that a nonskid matting was not used on the galley deck.

3. Said vessel was unseaworthy in that the drains in said galley were plugged or defective so as to cause water and debris to be on the deck of said galley.

4. Said defendant was negligent in that the galley floor was not made of nonskid material.

5. Said defendant was negligent in that a non-skid matting was not used on the galley deck.

6. Said defendant was negligent in allowing water and debris to be and remain on the deck of the galley.

7. Said defendant was negligent in failing to properly inspect said galley deck and particularly the matting thereon before requiring this plaintiff to work.

V.

That as a proximate result of said unseaworthiness of said vessel and its appurtenances and the negligence of the above-named defendant, its officers, agents and employees, on said January 3, 1956, said Johnnie Jordan was caused to fall with great force and violence, causing him severe nervous shock, physical and mental pain and suffering, a tearing,

twisting and wrenching of the muscles, tendons, bones, ligaments, nerves and soft tissue of his back and wrist, aggravation of pre-existing degenerative changes of the bones of his wrist, severe back strain and coccygodynia, and injuries to the internal organs of his lower pelvic area, from all of which said Johnnie Jordan was rendered sick, sore, nervous and distressed, and sustained severe bodily injuries; that as a proximate result of said unseaworthiness of said vessel and its appurtenances and the negligence of the above-named defendant, its officers, agents and employees, on said February 16, 1956, said Johnnie Jordan was caused to fall with great force and violence on the galley floor, causing him severe nervous shock, physical and mental pain and suffering, tearing, twisting and wrenching of the muscles, tendons, bones, ligaments, nerves and soft tissue of his back and aggravation of said pre-existing back and internal injuries, from all of which said Johnnie Jordan was rendered sick, sore, nervous and distressed and sustained permanent injuries.

VI.

That by reason of the injuries to said Johnnie Jordan plaintiff has been damaged thereby in the loss of consortium consisting of loss of his society, services, companionship and sexual intercourse, and all to her damage in the sum of \$50,000.00.

VII.

That said Johnnie Jordan is of the age of 56 years with a life expectancy under standard mortality

tables of 17.10 years; that plaintiff is of the age of 47 years with a life expectancy under standard mortality tables of 23.65 years.

Wherefore, plaintiff demands judgment against the above-named defendant in the full sum of \$50,000.00 general damages, and for her costs and disbursements incurred herein.

PETERSON, POZZI & LENT,

/s/ NELS PETERSON,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed June 27, 1957.

[Title of District Court and Cause.]

Civil No. 9220

REQUEST FOR ADMISSIONS

Defendant, States Marine Corporation of Delaware, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requests plaintiff Martha Jordan to admit the truths of matters of fact set forth in the request herein within ten days from date of service of this request for admissions:

1. That the fall of Johnnie Jordan and the negligence of defendant and/or unseaworthiness of the vessel SS "Cotton State" as alleged in plaintiff's complaint as occurring on or about January 3, 1956,

if it occurred, did occur on the SS "Cotton State" while Johnnie Jordan was a seaman aboard said vessel and while said vessel was on the high seas en route from Long Beach, California, to Yokahoma.

2. That the fall of Johnnie Jordan and the negligence of defendant and/or unseaworthiness of the vessel SS "Cotton State" as alleged in plaintiff's complaint as occurring on or about February 16, 1956, if it did occur, did occur on the SS "Cotton State," while Johnnie Jordan was a seaman aboard said vessel and while said vessel was on the high seas en route from a port in the Far East to San Francisco, California.

3. That the said Johnnie Jordan, husband of plaintiff Martha Jordan brought an action under and pursuant to Section 33 of the Merchant Marine Act of June 5, 1920, commonly known as the Jones Act in the Circuit of the State of Oregon in and for the County of Multnomah, against States Marine Corporation of Delaware, this defendant, in Civil Action No. 231,758 claiming \$60,000.00 general damages and \$5,166.75 special damages for personal injuries alleged to be permanent as well as for loss of past and future wages and medical expenses incurred arising out of the very same occurrence of January 3rd and February 16, 1956, as set forth in plaintiff's complaint on file in the above-entitled action, and after trial of said Civil Cause No. 231,-758 the said Johnnie Jordan secured a judgment against States Marine Corporation of Delaware for \$20,166.75 and costs after which the said Johnnie

Jordan voluntarily remitted all of said judgment except \$12,666.75 and costs and thereafter on or about May 27, 1957, States Marine Corporation of Delaware fully satisfied said judgment of record.

4. That the said Johnnie Jordan prior to May 27, 1957, asserted a claim against States Marine Corporation of Delaware for maintenance and cure, past and future, claimed by him to be due as a result of the injuries claimed to have been sustained by him as a result of the occurrence of January 3rd and February 16th, 1956, as set forth in plaintiff's complaint herein.

5. That on or about May 27, 1957, the said Johnnie Jordan executed, in writing, a full and complete release of all claims and demands against States Marine Corporation of Delaware as set forth in Exhibit "A" attached to this request for admissions.

6. That on or about May 27, 1957, for the purpose of satisfying in full that certain judgment above referred to in Civil Cause No. 231,758 and all claims and demands whatsoever of the said Johnnie Jordan including his claim for past and future maintenance and cure, the States Marine Corporation of Delaware paid to Johnnie Jordan the sum of \$14,000.00, receipt of which he acknowledged.

7. That prior to commencement of the herein action, plaintiff Martha Jordan had full knowledge of matters set forth in Item 3 through 6 inclusive of this request for admissions.

8. That Martha Jordan the plaintiff is a resident and citizen of the State of Oregon.

WHITE, SUTHERLAND AND
WHITE,

Attorneys for the Defendant.

/s/ WILLIAM F. WHITE.

Service admitted.

EXHIBIT A

Full Release of All Claims and Demands

To Whom It May Concern:

Whereas, on or about the 1st day of May, 1956, one Johnnie Jordan, the undersigned, commenced an action as plaintiff in the Circuit Court of the State of Oregon for the County of Multnomah, Civil No. 231758 against the States Marine Corporation of Delaware, a corporation, as defendant, in which the said plaintiff claimed damages in the amount of \$60,000.00 arising out of injuries allegedly received while employed as a galley utility aboard the vessel "SS Cotton State" on or about January 3, 1956, and also for a subsequent alleged injury occurring on the same vessel on or about February 16, 1956; and

Whereas, the said defendant answered said complaint and a trial of said cause was had before a jury which on or about March 15, 1957, returned a

verdict in favor of plaintiff for \$20,166.75 after which a motion for a new trial was made after which the Court ordered a new trial unless plaintiff remitted all but \$12,666.75 of said judgment after which plaintiff did remit all but \$12,666.75 of said judgment, after which defendant filed written notice of appeal; and

Whereas, in addition to said claim which the undersigned had against States Marine Corporation of Delaware for matters as set forth in the afore-described action, the said undersigned asserted an additional claim against States Marine Corporation of Delaware and/or the vessel "Cotton State" for maintenance and cure arising out of injuries sustained by him while aboard the "Cotton State" and in consideration of the payment of \$14,000.00 and the full satisfaction of judgment in the aforementioned civil action No. 231758, the undersigned desires and intends to give a full and complete release to said States Marine Corporation of Delaware and the said vessel "Cotton State" of all claims and demands whatsoever.

Now, Therefore, I, Johnnie Jordan, the undersigned, being over the age of twenty-one (21) years and presently residing in Portland, Oregon, for and in consideration of the payment to me of the sum of Fourteen Thousand and no/100ths (\$14,000.00) Dollars in lawful money of the United States of America, the receipt of which money is hereby acknowledged, having remised, released and forever discharged, and by these presents do, for myself, my

heirs, executors, administrators and assigns, hereby remise, release and forever discharge the States Marine Corporation of Delaware, a corporation, its underwriters, its officers, agents and employees as well as the vessel and her owners, operators, charterers, lessees, manager, underwriters, master, officers and crew and each and all of them and all persons, firms and corporations having any interest in and to said vessel "Cotton State" of and from any and all claims and demands of any and every kind, name, nature or description, and from any and all libels, actions, suits or causes of action either at law, in equity or in admiralty or by virtue of any statutory right under any state or federal law which I now have or in the future might have against the said corporations, persons, firms or vessel, including all claims or demands on any account whatsoever, whether or not the same be now existent or be known to me or whether it later develops or becomes existent or known or known to me in the future, by reason of or arising out of personal injuries and/or property damage sustained by me while aboard the said vessel "Cotton State" as a galley utility or crew member of said vessel during the time the said vessel was in port or at sea during a voyage No. 55 commencing on or about December 13, 1955, and terminating on or about February 17, 1956, and whether or not such was included in the subject matter of that certain action which I, as plaintiff, commenced in the Circuit Court of the State of Oregon, for the County of Multnomah, Civil No.

231758 against the States Marine Corporation of Delaware, a corporation, as defendant.

Expressly included in this release but not necessarily limited thereto is my release which I hereby make of any and all claims, known or unknown to me, which I now or in the future may have except for this release against the States Marine Corporation of Delaware, its officers, agents employees and underwriters and the said vessel "Cotton State" and her owners, operators, charterers, underwriters, officers and crew, for past, present or future maintenance and cure under any laws of the United States of America arising out of any accident, occurrence or employment while aboard said vessel "Cotton State" in port or at sea during the voyage No. 55 commencing on or about December 13, 1955, and terminating on or about February 17, 1956.

It is further understood and agreed that this settlement is the compromise of a doubtful and disputed claim and that the payment herein provided for is not to be construed as an admission of liability, which liability is expressly denied by said States Marine Corporation of Delaware, its underwriters, officers, employees, and agents and the vessel "Cotton State" and her owners, operators, charterers, underwriters, officers and crew.

The undersigned does hereby affirm and acknowledge that he has read the foregoing release and fully understands the import of each and every word therein and has executed the same after having

consulted doctors, proctors and attorneys of his own choosing and with full knowledge that the injuries sustained by him while employed aboard the said "Cotton State" while in port or at sea during the voyage No. 55 which commenced on or about December 13, 1955, and terminated on or about February 17, 1956, may be permanent in character; might even increase in severity and other injuries, aches or pains not presently known or felt now might later develop.

The undersigned further acknowledges that he clearly understands the import of each and every word of this release and that by the execution of this release, it is intended by him that he is compromising and settling a disputed claim and forever giving up any and all claims, demands or causes and that this release applies to all unknown, unsuspected as well as unanticipated injuries, aggravations or damages as well as those which are presently known or anticipated by him.

This release contains the entire agreement between the undersigned and the aforementioned corporations, firms, persons and vessel, and that the terms of this release are contractual and not merely recitals.

The undersigned hereby voluntarily executes this full release of all claims and demands on behalf of himself, his heirs, executors, administrators and assigns.

Dated at Portland, Oregon, this 27th day of May, 1957.

/s/ JOHNNIE JORDAN.

Approved as to Form and Substance:

/s/ NELS PETERSON,
Attorney for Johnnie Jordan.

State of Oregon,
County of Multnomah—ss.

Be It Remembered, That on this 27th day of May, 1957, before me the undersigned, a Notary Public in and for said County and State, personally appeared the within named Johnnie Jordan, known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] /s/ NELS PETERSON,
Notary Public for Oregon.

My Commission Expires: 6/10/60.

[Endorsed]: Filed June 27, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS OR FOR
SUMMARY JUDGMENT

Comes Now the defendant States Marine Corporation of Delaware and pursuant to rule 12 (b) of the Federal Rules of Civil Procedure moves the Court for an order dismissing plaintiff's action or in the alternative for a summary judgment in favor of defendant.

This motion is made upon the ground:

1. The Court lacks jurisdiction over the subject matter; and
2. The plaintiff has failed to state a claim upon which relief can be granted.

This motion is based upon plaintiff's complaint and upon the admissions made by plaintiff pursuant to written request for same on file herein.

WHITE, SUTHERLAND AND
WHITE,

/s/ WILLIAM F. WHITE,
GRAHAM, JAMES & ROLPH,
Attorneys for Defendant.

Service admitted.

[Endorsed]: Filed July 9, 1957.

In the United States District Court
for the District of Oregon
Civil No. 9220

MARTHA JORDAN,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Defendant.

SUMMARY JUDGMENT

Motion of defendant States Marine Corporation of Delaware to dismiss or for summary judgment having come on regularly to be heard before the above-entitled Court; Nels Peterson, Esq. of Messrs. Peterson, Pozzi & Lent appearing for the plaintiff and William F. White, Esq., of Messrs. White, Sutherland & White appearing for the defendant; said motion being based upon the plaintiff's complaint and her admissions and it appearing no genuine issue as to a material fact exists and that as a matter of law defendant is entitled to a summary judgment;

It Is Hereby Ordered, Adjudged and Decreed that a summary judgment be, and it is hereby entered in favor of defendant and against plaintiff dismissing said action.

Dated: September 30th, 1957.

/s/ GUS J. SOLOMON,

Judge, United States District
Court.

[Endorsed]: Filed October 1, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Martha Jordan, Plaintiff in the above entitled cause hereby gives Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from a certain Judgment entered at Portland, Oregon, on the 1st day of October, 1957, by the Honorable Gus J. Solomon, Judge of the United States District Court for the District of Oregon, in favor of the defendant and against plaintiff herein.

Dated this 31st day of October, 1957.

PETERSON, POZZI AND
LENT,

/s/ BERKELEY LENT,
Attorneys for Plaintiff-
Appellant.

Service accepted.

[Endorsed]: Filed October 30, 1957.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME
TO MAKE AND FILE DESIGNATION OF
RECORD ON APPEAL

Comes now the plaintiff, Martha Jordan, and based upon annexed affidavit of Edwin A. York, respectfully moves the Court for an order exetnding the time of the defendant to make and file a desig-

nation of record on appeal with the Clerk of the United States Court of Appeals for the Ninth Circuit, to and including the 10th day of January, 1958.

PETERSON, POZZI AND
LENT,

/s/ EDWIN A. YORK,
Attorneys for Plaintiff
Martha Jordan.

I hereby certify that I am one of the attorneys for the plaintiff in the above entitled cause; that I have prepared the foregoing motion, that the same is made in good faith and not for the purpose of delay and that in my opinion said motion is well founded in law.

/s/ EDWIN A. YORK,
Of Attorneys for Plaintiff.

So stipulated:

/s/ WILLIAM F. WHITE,
Of Attorneys for Defendant.

Affidavit in support of motion attached.

[Endorsed]: Filed December 9, 1957.

[Title of District Court and Cause.]

ORDER

It appearing to the Court from the record and file herein that the plaintiff has filed a Notice of Appeal

to the United States Court of Appeals, for the Ninth Circuit and that the plaintiff has filed a motion for an order extending the time in which to file a designation of record on appeal, and it appearing to the Court that good cause exists therefore; now therefore,

It Is Hereby Ordered that the time of the plaintiff for making and filing a designation of record on appeal to the United States Court of Appeals for the Ninth Circuit be and the same hereby is extended and including the 10th day of January, 1958.

Dated this 9th day of December, 1957.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed December 9, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Transcript on removal from Circuit Court, Multnomah County, Oregon, Bond on removal, Request for admissions, Motion to dismiss or for summary judg-

ment, Summary judgment, Notice of appeal, Undertaking for costs on appeal, Motion for order extending time to make and file designation of record on appeal, Order for extension of time for filing designation of record on appeal, Designation of Record on appeal by Appellant, Designation of record on Appeal by Appellee and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9220, Martha Jordan, plaintiff and appellant vs. States Marine Corporation of Delaware, a corporation, defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of December, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ MILDRED SPARGO,
Deputy Clerk.

[Endorsed]: No. 15830. United States Court of Appeals for the Ninth Circuit. Martha Jordan, Appellant vs. States Marine Corporation of Delaware, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 16, 1957.

Docketed: December 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15830

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Pursuant to Rule 17 (6) of the rules of the above-entitled Court, appellant present the following statement of points upon which she intends to rely on appeal in the above-entitled cause.

I.

The trial court erred in granting a summary judgment in favor of the defendant and against plaintiff dismissing said action upon the grounds that plaintiff failed to state a claim upon which relief could be granted.

Appellant adopts a designation of record as filed in the United States District Court for the District of Oregon, in the above-entitled cause.

PETERSON, POZZI AND
LENT,

/s/ EDWIN A. YORK,

Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 7, 1958.

United States
COURT OF APPEALS
for the Ninth Circuit

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF
DELAWARE, a corporation,

Appellee.

APPELLEE'S ANSWERING BRIEF

Henry R. Rolph,
Francis L. Tetreault,
GRAHAM, JAMES & ROLPH,
310 Sansome Street,
San Francisco, California,

William F. White,
WHITE, SUTHERLAND & WHITE,
1100 Jackson Tower,
Portland, Oregon,

Attorneys for Appellee.

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United States
COURT OF APPEALS

for the Ninth Circuit

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF
DELAWARE, a corporation,

Appellee.

ANSWERING BRIEF OF APPELLEE
STATES MARINE CORPORATION
OF DELAWARE

The Court below had jurisdiction. This Court has jurisdiction. The undisputed facts have been correctly stated by Appellant in her statement of the case.

This appeal presents the novel question of whether or not the Appellant-wife has a cause of action for damages against the Appellee-shipowner for loss of consortium arising out of the fact that the Appellee-shipowner negligently inflicted bodily injury upon her sea-

man-husband while employed in the service of Appellee's American merchant vessel on the high seas.

It is conceded that within the State of Oregon by reason of a 1941 amendment to the Oregon's Married Woman's Act, ORS 108.010, a wife has a cause of action for loss of consortium against a person in Oregon negligently injuring her husband to the same extent that the common law had previously accorded a husband such an action for the negligent injury of his wife. ORS 108.-010 created the Appellee-wife's cause of action and did not merely remove an impediment to her bringing it. *Ellis v. Fallert* (1957), 209 Or. 406, 307 P.2d 283; *Sheard v. Oregon Electric Ry. Co.* (1931), 137 Or. 341, 2 P.2d 916.

ORS 108.010 reads:

"All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband hereby are repealed; and all civil rights belonging to the husband not conferred upon the wife prior to June 14, 1941, or which she does not have at common law, hereby are conferred upon her, including, among other rights, the right of action for loss of consortium of her husband."

The United States District Court for the District of Oregon correctly entered summary judgment in favor of the Appellee-shipowner because:

1. If any tort was committed by the Appellee-shipowner it was a maritime tort in that the "place of wrong" was on the high seas; not in the Appellant-wife's home in Portland, Oregon.

2. Extra-territorial effect cannot be given to ORS 108.010 so as to impose liability upon a citizen of Delaware operating an American merchant vessel on the high seas.

3. To allow the Oregon created action of the Appellant-wife against Appellee-shipowner would work a material prejudice to the characteristic features of both the general maritime law and the Jones Act and interfere with the proper harmony and uniformity of that law at its interstate and international level contrary to the *Jensen* doctrine.

4. It is too late for Appellant-wife to contend that her action for loss of consortium merely supplements the general maritime law because Congress by enactment of the Jones Act and other legislation applicable to torts committed on the high seas has pre-empted the field.

5. The Appellant-wife having voluntarily surrendered her substantial right to consortium by tacitly permitting her husband to follow the sea has barred herself from right to sue for a loss she previously relinquished.

If any tort was committed by the Appellee-shipowner it was a maritime tort with "place of wrong" on the high seas; not in the Portland, Oregon home of the Appellant-wife.

The first critical question on this appeal is where the operative facts place the wrong. Did the tort occur on the high seas where allegedly the Appellee-shipowner negligently inflicted bodily injury upon the seaman-husband? Or, did the tort occur in the home of Appel-

lant-wife in Portland, Oregon where, as a consequence of her seaman-husband having been bodily injured on the high seas, she subsequently felt the loss of his alleged services, companionship, society and sexual intercourse? Otherwise put: Is a maritime or non-maritime tort herein involved?

Identically in point with the case at bar is *Westerberg v. Tide Water Associated Oil Co.* (1953), 110 N.E. 2d 395, 1953 AMC 553, where, as here, the wife of a seaman sued a shipowner for loss of consortium of her seaman-husband due to injuries which he received while employed at sea upon the shipowner's vessel. Both the Appellate Division of the Supreme Court of New York without opinion (107 N.Y.S. 2d 1004) and the Court of Appeals of New York with opinion (110 N.E. 2d 395) found without hesitation that a maritime tort was involved and dismissed the wife's complaint; the highest Court of the State of New York saying:

“PER CURIAM:

Judgment affirmed, without costs. The breach of duty by the defendant, which allegedly caused injuries to plaintiff's husband—injuries giving rise to her present action—occurred while the defendant's vessel was at sea and while he, as a seaman, was employed at service on that vessel. That alleged breach of duty by the defendant was a maritime tort. As such it cannot serve as a basis for plaintiff's complaint which demands relief of a character not within the purview of the 1920 amendment of the Merchants Marine Act (“Jones Act”) 41 Stat. 1007, 46 U.S. Code Sec. 688. Upon that subject the United States Supreme Court has had occasion to state ‘This Court has specifically held that the Jones Act is to have a uniform application throughout the

country, unaffected by 'local views of common law rules.' *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244. We pass upon no other question. Judgment affirmed, without costs. All concur."

Since then the Court in *Tate v. C. G. Willis, Inc.* (D. Ct. E.D., Va., 1957), 154 F. Supp. 402, likewise held that the domiciliary administratrix had no action against a shipowner for loss of her seaman-husband's consortium when negligently killed aboard a vessel by reason of the Court dismissing without comment libellant's second cause of action alleging loss of consortium.

However, let us consider on principle the operative facts in the case at bar to determine if it is sound for this Court to reach the same conclusion as did the above-mentioned Courts. Although the "high seas" do not constitute a state, a good point of departure in an analysis of the operative facts is the Restatement, Conflict of Laws, Section 377, which reads:

"The place of the wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place."

It is to be noted that when the American Institute of Law sought to define the "place of wrong" for a tort it carefully measured its language and for good reason chose the words "the last event necessary" rather than general expressions such as "where the damage was done" or "where the harm ensued." Courts which have employed the last mentioned terminology have done so in the "physical impact" cases where the place of damage coincided with the place where the last event necessary to render the actor liable also occurred. In this

“non-physical impact” case the place of damage is conceivably different than the place of the last necessary event; making critically operative the carefully chosen wording of Section 377 of the Restatement.

The closest analogy of which we can think to the Appellant-wife’s action for loss of consortium arising out of the negligent injury of her seaman-husband is that of her right of action for wrongful death had he been negligently killed at sea instead of injured. Comparatively, the consequences which the Appellant-wife would suffer in the one case is much the same, if not identical, as in the other. In both cases the last event necessary to render the actor liable is negligence on his part that directly inflicts either bodily injury or death upon the seaman-husband. Both injuries are conditioned upon the Appellee-shipowner negligently injuring or killing the seaman-husband. In both cases the consequential injuries suffered by the wife are of the “non-physical impact” variety—loss of services, society, companionship and even sexual intercourse. Both actions are conditioned exclusively upon infliction of harm upon the seaman-husband. Both actions are creatures of statute and foreign to both the maritime law and the common law.

There can be little question but that the “place of wrong,” had the seaman-husband been killed instead of injured, would be either where the injury that caused death was inflicted or where the death occurred.

We invite the Court’s attention to the Restatement, Conflict of Laws, Section 391 and Comment (a) there-

under; both pertaining to the right of action for death. They read:

Sec. 391—Right of Action for Death

“The law of the place of wrong governs the right of action for death.”

“Comment: (a) The place of wrong, as used in this Topic, means the *place of wrong to the decedent, not where pecuniary loss is caused to his relative.*” (Emphasis added).

The decisions fully support this view:

Confronted with determining the place of wrong in order to apply the correct wrongful death Act in *Hickman v. Taylor* (E.D., Pa., 1947), 75 F. Supp. 528, where a seaman on a tugboat was drowned in an interstate river due to the tugboat owner’s negligence, Judge Kirkpatrick in determining the place of wrong to be upon the tug said:

“The law of the place of wrong governs the right of action for death. ‘The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.’ Restatement, Conflict of Laws, Sections 391 and 377, The ‘last event’ was the submerging of the forecastle, from which the drowning of Hickman resulted. *Rundell v. La Campagnie Generale Transatlantique*, 7 Cir., 100 F. 655.”

The last operative act of the actor is not entirely disregarded in determining the “place of wrong” of a tort, even though point of death or point of injury is subsequently on land or in a different jurisdiction. For example, in *Minnie v. Port Huron Terminal Co.* (1935), 295 U.S. 647, 79 L. Ed. 1631, the Court determined that the death of a stevedore occurring when a

crane toppled him off of a vessel and onto a dock was maritime in character even though he didn't meet injury or death until he struck the "non-maritime" dock.

Likewise, in *The Ogontz* (2 Cir., 1927), 16 F.2d 948, 1927 AMC 308, the Court determined that the place of the wrong was aboard ship on the high seas where the seaman became ill because of eating poor food supplied by the shipowner, even though the seaman didn't die until he was put ashore on the Gold Coast of Africa which had no wrongful death Act.

In the non-maritime field the rule of "last necessary event" is the same. In *Banks v. King Features Syndicate* (SDNY, 1939), 30 F. Supp. 352, a woman sued for breach of her right to privacy; a tort having striking similarity to loss of consortium. The woman in Oklahoma had an x-ray taken showing a hemostat in her pelvic region. The doctor who took the x-ray gave it to the King Features Syndicate, without the woman's permission. King Features Syndicate, with an article referring to the woman by name, published it in newspapers throughout the United States including the New York Journal. The Court concluded that the place of the wrong was not where the Oklahoma woman suffered for the invasion of her privacy but the place where the seal of privacy was first broken.

In *Vrooman v. Beach Aircraft Co.* (10 Cir., 1950), 183 F.2d 479 which concerned an action involving breach of warranty the plaintiff of Missouri sued an aircraft manufacturer of Pennsylvania who last repaired the plaintiff's airplane in Kansas representing it fit to fly

when it wasn't. The crash of the airplane and resulting death of its occupants occurred in Indiana. The "place of wrong" was determined by the Court to be Kansas where the last necessary act occurred.

Counsel for the Appellant-wife perhaps would not have been confused by generalities expressed in cases or have contended that the place of wrong in the case at bar was in Portland, Oregon had he given heed to the astute observation made by Walter Wheeler Cook in his article, *Tort Liability and the Conflict of Laws*, 35 Col. L. Rev. 202, to which he invited this Court's attention. At page 208 the author said:

"When confronted by these more complex situations in which the 'acts' in the sense defined by Mr. Justice Holmes, i.e., the movements of the actor's body, occur in one state, and the harm to the plaintiff occurs in another, courts and writers evade the difficulty and without adequate discussion assume that the applicable 'law' is that of the state in which the harm ensued but in which the actor did not act, and in which perhaps he has never been."

Both upon precedent and principle the Court below was correct in concluding that the undisputed operative facts established a maritime tort with the "place of wrong" on the high seas and thus entering summary judgment for the appellee-shipowner.

Extra-territorial effect cannot be given to ORS 108.010 so as to impose liability upon a citizen of Delaware operating an American merchant vessel on the high seas.

The Appellee-shipowner as a corporation of Delaware was a citizen of Delaware and was operating as shipowner the American merchant vessel COTTON STATE upon the high seas between California and the Far East. If a tortfeasor, it became such through negligence of its master or officers aboard the COTTON STATE or the unseaworthiness of its vessel on the high seas.

It is elementary that the liability for a tort committed on the high seas outside territorial waters of any state is determined by the law of the Nation whose flag the vessel flies.

Restatement, Torts, Section 406.

Where the vessel flies the American flag and where states and not nations are involved, the law of the state of domicile of the vessel or residence of her owner is equivalent to the law of the flag.

The Ogontz (2 Cir., 1927), 16 F.2d 948, 1927 AMC 308.

Hickman v. Taylor (DC, 1947), 75 F. Supp. 528, 533.

On occasion, the Courts have given extra-territorial effect to a state statute in order to allow recovery for a tort committed on the high seas where such state statute appears to be supplementary and not repugnant to the law maritime. However, in all such cases the Courts have applied the law of the state in which either the shipowner resided or the vessel was domiciled; *never the law of the state in which the plaintiff might reside.*

The Hamilton (1907), 207 U.S. 398, 52 L. Ed. 264.

The Ogontz, (2 Cir., 1927), 16 F.2d 948, 1927 AMC 308.

The E. B. Ward, Jr. (Cir. Ct., E.D. La., 1883), 17 Fed. 456.

Most recently, Judge Goodman in *Wilson v. Transocean Airlines* (D. Ct., Calif., 1954) 121 F. Supp. 85 at page 88, had occasion to discuss that which is required to give extra-territorial effect to a state statute on the high seas. He said:

“Legislative jurisdiction to impose a liability for a wrongful act at sea beyond the boundaries of the state had to rest upon one of two theories; either (1) that the vessel upon which the wrongful act occurred was constructively part of the territory of the state; or (2) that the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits. Neither theory sufficed for every situation.”

See:

Robinson, 36 Col. L. R. 406 (1936).

Magruder and Grout, 35 Yale L. Journal 395 (1926).

Putnam, 22 Case and Comment 125 (1915).

Since the Appellant-wife in this case has a cause of action created and bottomed entirely upon the 1941 amendment of the Oregon Married Women's Act as codified in ORS 108.010 she cannot possibly employ the Oregon Act extra-territorially in order to support her cause of action against Appellee-shipowner for a maritime tort occurring upon the high seas somewhere between California and the Far East. ORS 108.010 by its

language does not attempt to extend its application beyond the boundaries of the State of Oregon. It is also well settled that the implied condition of all state legislation is that such is intended to be operative only within the jurisdiction of the legislative body so enacting it. *Armburg v. Boston & M. R. Co.*, (1931), 276 Mass. 418, 177 N.E. 665, 80 ALR 1408; *Southern Pacific Railroad Co. v. Gonzales* (Ariz., 1936), 61 P.2d 377, 106 ALR 1012.

Of course, if the Appellant-wife should now attempt to "shift her rudder," so to speak, and look to the law of Delaware for authority upon which to sue for loss of consortium she will find that the law of that state denies the wife a right to sue a person for loss of consortium due to the negligent injury of her husband. *Delaware Code*, Title 13, Sec. 311; *Sobolewske v. German* (1924), 32 Del. 540, 127 Atl. 49.

Thus, the impropriety of giving extra-territorial effect to ORS 108.010 in order to impose liability upon the Appellee-shipowner operating on the high seas was a further cogent reason for the Court below entering a summary judgment in favor of Appellee.

Appellant-wife's action encroaches upon the characteristics and uniformity of the maritime law and should not be permitted to be imposed upon a shipowner.

A tort on the high seas concerns not only the internal economy and discipline of the vessel but commerce between nations. Commerce on the high seas is even more exclusively within the national care than interstate commerce on land. *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U.S. 18, 35 L. Ed. 613. The Supreme Court of the United States, as supreme architect of American maritime law has sharply stated that state encroachment upon the maritime law which works material prejudice to its characteristic features or interferes with its uniformity at interstate and international levels will not be tolerated. *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 206, 61 L. Ed. 1086. Although this so-called *Jensen* doctrine has since been qualified as to matters occurring in state territorial waters, *Standard Dredging Corp. v. Murphy* (1943), 319 U.S. 306, 87 L. Ed. 1416; or matters of procedural law, *Madruga v. Superior Court of San Diego County*, Calif. (1954), 346 U.S. 556, 98 L. Ed. 290; or matters of strictly local concern, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* (1955), 348 U.S. 310, 99 L. Ed. 337, it has never been questioned as being applicable with all its vigor in respect to matters occurring on the high seas or effecting vessels steaming between nations.

This unique action of the Appellant-wife created by an Oregon statute so far as it seeks to impose liability upon Appellee-shipowner for a wrong committed upon

its Delaware vessel on the high seas is an unwarranted encroachment upon an area of maritime law that has long been under exclusive national care. The action, if allowed, would set the wife upon a higher pedestal than her seaman-husband; would give her an action for negligence, which until the Jones Act, her seaman-husband never had. *The Osceola* (1903), 189 U.S. 158, 47 L. Ed. 760. Furthermore, with Appellant-wife's allegations in her complaint of the vessel being unseaworthy, she would not only be imposing a "liability without fault" upon the Appellee-shipowner where it owes to her no such duty but would also be giving her a new specie of fault upon which to ground her action beyond that given her in Oregon by the Oregon Act.

Perhaps, the only distinction between the effect upon the Appellee-shipowner of this action for loss of consortium and an action for the seaman-husband's wrongful death is that in the former action a new liability entirely foreign to maritime law is added to the shipowner's woes without deminution or elimination of his liability to the seaman-husband, while in the wrongful death action the personal injury liability, if it existed at all, would pass out of the picture in favor of the wrongful death liability. Thus, the novel idea of giving the wife of a seaman an action for loss of consortium adds a new and additional liability to the shipowner; not a substitute of one for another.

The maritime law in this generation has fashioned for the seaman the most liberal remedies in the world in the nature of maintenance and cure and Jones Act

causes of action in which he can take along with him to the jury his traditional claim that the vessel was unseaworthy. As a ward of the Admiralty Court the seaman can do no wrong. All of this has come about and has been justified only upon the ground that by the hazards of the sea and the peripatetic nature of his calling the seaman is primarily a poor and friendless soul. To now let his wife ride his coat-tail for another bite at the apple is repugnant to every concept of every law of the sea.

The Oregon Act, ORS 108.010 which gives the Appellant-wife her cause of action, if applied to shipowners operating on the high seas, would completely destroy the uniform application of the maritime law for the reason that all but a very few states in the Union deny a wife such a cause of action. This situation would make it impossible for the shipowner to determine the liability of his maritime venture as it would depend upon: (1) if his seamen were married, and (2) what state the wife might be residing at time an unforeseen injury was inflicted upon her seaman-husband while at sea.

It is too late for Appellant-wife to contend that her action for loss of consortium merely supplements maritime law because Congress has pre-empted the field of torts on the high seas.

Having shown in our discussion of the "place of the wrong" that Appellant-wife's action for loss of consortium is remarkably similar to an action for wrongful death, had her seaman-husband wrongfully met his death on the high seas, it becomes important to consider whether by the same analogy the Appellant-wife can successfully contend that her loss of consortium action like a wrongful death action is a permissible state encroachment because it is supplementary rather than repugnant to the maritime law.

It is true that prior to 1920 the Supreme Court of the United States permitted extra-territorial effect to be given to the wrongful death Act of the state wherein the shipowner resided in order to provide a remedy for wrongful death on the high seas. *The Hamilton* (1907), 207 U.S. 398, 28 S. Ct. 133. In those days, prior to Congress entering the field, neither the common law nor the maritime law allowed recovery for wrongful death. The Supreme Court which constitutionally has the ultimate power to fashion new admiralty law at that time very wisely permitted the extra-territorial application of state legislation to fill the void. However, since then, Congress has legislated so completely and unequivocally in respect to death and bodily injury upon the high seas that it must be presumed that it intended to pre-empt the field.

In 1920 by almost simultaneous action, Congress enacted the Jones Act (Merchant Marine Act of 1920) 41 Stat. 1007, 46 USCA 688 and the Death on the High Seas Act, 41 Stat. 537, 46 USCA 761-768. With the Jones Act Congress added to the seaman's action for unseaworthiness a right to sue the shipowner for personal injuries and death arising out of negligence. By the Death on the High Seas Act Congress gave the personal representative of every person wrongfully dying on the high seas a cause of action. As to personal injuries occurring to passengers aboard ship it left them their maritime or common law remedy but did in 1939 legislate to protect them from unreasonably short statutes of limitations and for stipulations exonerating the shipowner from his own negligence. 49 Stat. 960, 1480, 46 USCA 183 (b) and (c).

In 1935 Congress enacted the first substantial amendment to the Limitation of Liability Act since the 1880's, requiring a minimum limitation fund on claims for loss of life and bodily injury. 49 Stat. 960, 46 USCA 183, 185. We mention this series of legislative enactments to show how completely Congress has undertaken to legislate with respect to personal injuries or deaths occurring on the high seas. Presently, the only place a state wrongful death Act is applied to a maritime tort is where death occurs to a non-seaman within the territorial waters of a particular state. Since the Jones Act, no state wrongful death Acts can be applied to seamen wrongfully killed even in territorial waters of a state. *Lindgren v. United States* (1930) 281 U.S. 38, 74 L. Ed. 686.

It is our contention that with enactment of the Jones Act Congress has evidenced an intent to envelope the entire field of tort on the high seas and has pre-empted the field so far as torts connected with or conditioned upon injury to a seaman are involved. Congress has, in effect, told the world that when and if it deems it appropriate for the wife of a seaman-husband to have a cause of action against a shipowner for loss of consortium arising out of a personal injury to her seaman-husband on the high seas it will so enact such a law and until then states should not meddle in that which is exclusively the legislative concern of Congress.

The doctrine of Federal pre-emption of a legislative field is no new thing. If Congress has not filled up every little "chink" in the wall it is not for the state to do so on the theory that it is helping Congress in its exclusive concern. Mr. Justice Holmes in *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.* (1915), 237 U.S. 597 59 L. Ed. 1137 said in respect to a state law that appeared to help interstate commerce (U.S. p. 604):

"When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

The Supreme Court's most recent expression on the subject of Congressional pre-emption of a legislative field is found in the Smith Act case of *Pennsylvania v. Nelson* (1957), 350 U.S. 497, 100 L. Ed. 640.

More in point, however, to the Appellant-wife's

cause of action is the Supreme Court's view that the Jones Act is to be uniformly applied and remain unaffected by local views of common law. The Court said in *Garrett v. Moore-McCormack Co.* (1942), 317 U.S. 239, 87 L. Ed. 239 at U.S. page 244:

“This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by ‘local views of common law’ *Panama R. Co. v. Johnson*, 264 U.S. 375, 392. The Act is based upon, and incorporates by reference, the Federal Employers’ Liability Act, which also requires uniform interpretation. *Second Employers Liability Cases*, 223 U.S. 1, 55 et seq.”

It is not a sufficient answer to say that the Appellant-wife's cause of action is separate from her husband's cause of action and thus has nothing to do with the Jones Act because her action is conditioned upon the identical operative facts which give rise simultaneously to her seaman-husband's action under the Jones Act and affects the same shipowner. This certainly was the view of the Court of Appeals of New York in *Westerberg v. Tide Water Associated Oil Co.* (1953), 110 N.E. 2d 395, 1953 AMC 553 (opinion on pages 4 and 5 of this brief).

Appellant-wife by her conduct in permitting her husband to follow the sea has forsaken so much of her consortium that she is now barred from claiming damage for its loss.

An action by a wife for loss of her husband's consortium is apparently a new wrinkle in tort law. When one gives a wife a personal type of cause of action which only her husband previously had, and when one attempts to apply it to the law and activity of the sea to which it never belonged, some strange anomalies arise.

One thought that persists in our analysis of the Appellant-wife's unique action is how she can be entitled to recover damages from a shipowner for a loss of consortium with her seaman-husband when by her conduct in permitting her husband to follow the sea she has already relinquished substantially all consortium. This is particularly true in the case at bar, where the seaman-husband was already paid for the loss of services by receiving \$14,000.00 which covered present and future wages as well as maintenance and cure. We cannot say that all loss of consortium was relinquished by the wife by reason of her husband following the sea, but that which might be left is so minimal as to question the wisdom of permitting an action of this type to be imposed in such a situation.

We find some support for our contention that the Appellant-wife's conduct in tacitly permitting her husband to follow the sea constitutes a bar to her action in the Restatement of Torts. Where a husband by con-

sent or by his conduct indicates a willingness that his wife's affections be alienated, his cause against another for alienation of his wife's affections is barred. Restatement, Torts, Section 687. A parent who consents to the intentional infliction of bodily harm upon his minor child is barred from recovery against another person. Restatement, Torts, Section 702.

CONCLUSION

This Court should affirm the summary judgment entered by the United States District Court for the District of Oregon in favor of Appellee for the reasons:

1. That the last necessary act to render Appellee-shipowner liable for the alleged tort occurred aboard Appellee's vessel at the time operating upon the high seas; making the tort, if any, committed by Appellee-shipowner a maritime tort governed by the Jones Act and general maritime law.

2. Extra-territorial effect cannot be given to Oregon's ORS 108.010 which created Appellant-wife's cause of action for loss of her husband's consortium so as to impose liability upon the Appellee-shipowner, a citizen of Delaware operating its vessel on the high seas.

3. To allow the Oregon created action of Appellant-wife against Appellee-shipowner for loss of consortium of her seaman-husband would work a material prejudice to the characteristic features of both the Jones Act and the general maritime law and interfere with the proper harmony and uniformity of that law at its inter-

state and international level contrary to the well established *Jensen* doctrine.

4. It is too late for Appellant-wife to contend that her action for loss of consortium merely supplements the general maritime law because Congress by enactment of the Jones Act and other legislation has pre-empted the field of torts occurring upon the high seas.

5. The Appellant-wife having voluntarily relinquished in substance any right to loss of her husband's consortium by tacitly permitting him to follow the sea has barred herself from the right to sue Appellee-shipowner for loss of consortium which she had already forsaken.

WHEREFORE, the Appellee prays that this Court affirm the judgment entered in its favor in the Court below.

Respectfully Submitted,

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15830

No. 9220

**United States
COURT OF APPEALS
for the Ninth Circuit**

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF
DELAWARE, a corporation,

Appellee.

APPELLANT'S BRIEF

*On Appeal from the United States District Court for the
District of Oregon.*

FILED

MAR 17 1958

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APPELLANT'S BRIEF

*On Appeal from the United States District Court for the
District of Oregon.*

JURISDICTION

The United States District Court for the District of Oregon had jurisdiction of this proceeding at law by reason of Title 28, U.S.C.A., Section 1441.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment of the United States District Court for the District of Oregon by reason of Title 28, U.S.C.A., Section 1291.

The complaint was filed in the Circuit Court of the State of Oregon for the County of Multnomah on June

17, 1957 (Tr. Rec. 3). The appellee then within twenty days from service of the summons, filed a petition with the District Court of the United States for the District of Oregon for removal of the civil cause from the state court (Tr. Rec. 3). The complaint, petition for removal and the request for admissions show diversity of citizenship between the parties; the appellant is a resident and citizen of the State of Oregon and the appellee is organized and existing under the laws of the State of Delaware (Tr. Rec. 3, 5, 7, 15). The controversy exceeds the sum of \$3,000.00 exclusive of interest and costs (Tr. Rec. 4, 11).

Upon removal of the cause from the state court and filing of requests for admissions, the appellee moved the Court to dismiss the cause or for a summary judgment (Tr. Rec. 12, 21). Upon argument, the Honorable Gus J. Solomon, a judge of the District Court, ordered that a summary judgment be entered in favor of the appellee dismissing the cause and the same was entered October 1, 1957 (Tr. Rec. 22). On October 30, 1957, notice of appeal was duly filed (Tr. Rec. 23) and an appeal duly taken to and perfected in this Court.

STATEMENT OF THE CASE

This is an action at law by the appellant, the wife of a seaman who was injured at sea as a result of the unseaworthiness of a vessel owned and operated by the appellee and the negligence of the appellee in certain particulars during the time that the appellant's husband was employed aboard the vessel, for loss of consortium, con-

sisting of loss of society, services, companionship and sexual intercourse. The appellant was and is a resident and citizen of the State of Oregon during all times mentioned herein.

Johnnie Jordan, the husband of the appellant, brought an action under Section 33 of the Merchant Marine Act of June 5, 1920 in the Circuit Court of the State of Oregon for the County of Multnomah, against the States Marine Corporation, the appellee, in Civil Action No. 231-758 and after trial a judgment for \$20,-166.75 and costs was secured but all was remitted except \$12,666.75 and costs; that on or about May 27, 1957, the States Marine Corporation fully satisfied said judgment of record.

Recovery was obtained for injuries sustained by Johnnie Jordan when he was caused to fall on January 3, 1956 and again on February 16, 1956 due to the negligence of the appellee and/or unseaworthiness of the vessel SS "COTTON STATE." Johnnie Jordan was at the time of these two occurrences aboard the vessel on the high seas between California and the Far East. These same facts are the basis for the appellant's independent cause of action now before this Court.

Johnnie Jordan on or about May 27, 1957, executed in writing a full and complete release of all claims against States Marine Corporation (Tr. Rec. 15) and did receive the sum of \$14,000.00 in settlement and payment in full of the judgment and all claims and demands whatsoever against the States Marine Corporation.

The instant case was originally filed in the Circuit Court for the State of Oregon for the County of Multnomah, the appellant's residence and domicile, and upon appellee's petition, the cause was removed to the District Court of the United States for the District of Oregon and there a summary judgment was entered dismissing the action for failure to state a claim upon which relief could be granted.

ASSIGNMENT OF ERROR

The appellant hereby assigns as error the summary judgment of the District Court dismissing the action of the appellant for failure to state a claim upon which relief could be granted.

ARGUMENT OF THE CASE

Point 1. Under the law of Oregon a wife can recover for loss of consortium due to the negligence or wrong of a third party.

Elling v. Blake-McFall Co., 85 Or. 91, 166 Pac. 1957 (1917).

Pugsley v. Smyth, 98 Or. 448, 194 Pac. 686 (1921).

Keen v. Keen, 49 Or. 362, 90 Pac. 147 (1907).

Kosciolek v. Portland Ry., L. & P. Co., 81 Or. 517, 160 Pac. 132 (1916).

Sims v. Sims, 76 Atl. 1064.

Cowgill, Adm'r. v. Broock, Adm'r., 189 Or. 282, 218 P. 2d 445 (1950).

Smith v. Smith, 205 Or. 286, 287 P. 2d 572 (1955).

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- Cooney v. Moomaw, et al, 109 F. Supp. 448
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- Best v. Samuel Fox Co., 2 King's Bench 654, 2
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- 22 Univ. Mich. L. Rev. 1.
ORS 108.010.

Point 2. The appellant-wife has an independent cause of action for loss of consortium due to the wrongful conduct of the appellee, distinct from that of her husband, granted by the State of Oregon, the place of the appellant's domicile, though both injuries arose from the same wrongful conduct.

- Valentine v. Polk, 95 Conn. 560, 111 Atl. 869
(1920).
- Smith v. Smith, supra.
- Giddings v. Giddings, et al, 167 Or. 504, 114 P.
2d 1009 (1941).
- ORS 108.010.
8 History of English Law (3d ed. 1932) p. 429.

Point 3. The tort against the seaman-husband was a maritime tort; the breach of duty and the injury sustained occurred upon the high seas. But as to the appellant, the place of the wrong or the place where she

sustained her injury was in Oregon, the state of her residence and domicile.

Frankel v. Bethlehem Fairfield Shipyard, 46 Fed. Supp. 242, 244 (DC Md).

Forbes v. Forbes, 152 Or. 691, 55 P. 2d 727 (1936).

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Cooney v. Moomaw, *supra*.

The Admiral Peoples, 55 U.S. 649, 55 S. Ct. 885, 79 L. Ed. 1633 (1935).

Otey v. Midland Valley R. R. Co., 108 Kan. 755, 197 Pac. 203 (1921).

Hunter v. Derby Foods Inc., 110 F. 2d 970 (CCA 2d 1940).

Anderson v. Linton, 178 F. 2d 304 (CCA 7th 1949).

Rundell v. LaCampagnie Generale Transatlantique, 100 F. 655 (CCA 7th 1900).

Rabel, *The Conflicts of Laws, A comparative Study*, Vol. II, page 346 (1st ed. 1947).

Beale, Vol. II Section 377.2.

Restatement of Conflict of Laws, Section 377.

Point 4. Recovery is not barred to the appellant by the Jones Act or the general maritime law.

Westerberg v. Tide Water Associated Oil Co., 110 N. E. 2d 395, 1953 AMC 553.

Garrett v. Moore-McCormick Co., 317 U.S. 239, 1942 AMC 1645.

The Hamilton, 207 U.S. 398, 52 L. Ed. 264, 28 S. Ct. 133.

American Steamboat Co. v. Chase, 16 Wall 252, 21 L. Ed. 369.

A husband may maintain an action for loss of consortium when the loss thereof is occasioned by the negligence of a third person under the law of Oregon and under the great weight of authority. *Elling v. Blake-*

McFall Co., 85 Or. 91, 166 Pac. 1957 (1917), and cases cited therein. The rule was there stated, 85 Or. at 94 “. . . legislation of modern times has greatly affected the status of married women by the recognition of their rights to a separate existence, thus empowering them to exercise dominion over their separate property, and to contract, and conferring upon them power to sue or to be sued; but it has not in any wise abridged the common-law right of a husband to the companionship, love and services of his wife which are comprehended in the term ‘consortium’ and his accompanying right to sue therefor, in the event of its loss occasioned by some personal injury to her, *negligently inflicted by a third person* . . . we are not in accord with the assertion that a husband is entitled to recover damages for the loss of the services of his wife only in actions for seduction, alienation of affections and the like.” *Pugsley v. Smyth*, 98 Or. 448, 194 Pac. 686 (1921).

It is clear then, as to a plaintiff husband, he may recover for loss of consortium whether its loss was occasioned by the negligent or intentional act of another in this jurisdiction.

Keen v. Keen, 49 Or. 362, 90 Pac. 147 (1907), established the right of a wife to have redress “against one who wrongfully takes her husband from her.” That case involved an intentional tort wherein the plaintiff wife sued for alienation of her husband’s affections. The Court said there that consortium includes the husband’s society, love and assistance and that a married woman should have a remedy for the vindication of a violated right and that her rights and obligations have been

greatly increased and enlarged by the enabling statutes and the law now affords her an adequate *remedy*.

The question of whether a wife could recover for loss of consortium due to the negligence of a third person, first came before the Oregon Supreme Court in *Kosciolek v. Portland Ry., L. & P. Co.*, 81 Or. 517, 160 Pac. 132 (1916); the court denied redress to the plaintiff's wife. The right of the husband to maintain such an action was admitted but the Court held the wife was unable to maintain such an action at common law and the married women's act did not confer on a wife any new right of action, but merely allows her to act independently of her husband for redress in the courts of the *infringement of rights which she already had*; a claim for the loss of the society or assistance of a husband cannot be enforced by either a wife or widow, *unless created by statute*, since consortium is not a natural right *nor a right of the wife recognized at common law*. The court did recognize the right to redress by the wife where there was a direct attack upon the marriage relation itself as in the case of alienation of affections or criminal conversation.

In an article in 22 Univ. Mich. L. Rev., page 1, entitled "The Change in the Meaning of Consortium," Professor Evans Holbrook destroys the courts' rationale by pointing out that the absence of cases in the common law reports is explained by the *procedural impediment* to a wife suing in her own name. The cases do not deny such a right, the procedural impediment simply prevented its recognition or growth. The Married Women's Acts were designed to place the wife on legal parity with the husband and they undermine the validity of the objection.

That the cause of action in the wife for loss of consortium was a matter of the *remedy* as held in *Keen v. Keen* and not the right itself was recognized in an early New Jersey case, *Sims v. Sims*, 76 Atl. 1064, (though that case involved an intentional and not a negligent tort):

“That the right to consortium was recognized by the common law as an existing right in the married woman, however, but incapable of enforcement, owing to the common law doctrine of identity of personality, is made clear by Blackstone, who, in his third volume, dealing with ‘Private Wrongs’ mentions a class in which the common law, failing to provide a remedy, recognized the right of the ecclesiastical courts, or their successor, to administer redress, ‘not for the reformation of the party injuring, but for the sake of the party injured; to make him a satisfaction and redress for the damages he has sustained.’ (Here the court refers to Blackstone’s discussion of injuries respecting the rights of marriage.) . . . This recognition by the common law of the fact that the loss of consortium was an injury to the wife, and that its enforcement was her right, and the corresponding failure, on the other hand, to provide her with a legal *remedy* for the tort, is properly definitive of her state at common law, and places that branch of legal learning upon its proper footing. From which it must follow, that if at any time the legislature should remove the common law impediment as to remedy, the right existing is thus made capable of enforcement. That the common law courts failed to find a remedy is, under the decisions, rather a recognition of the right, than a denial of its existence. For it may be said that the history of common law procedures is largely the history of substantive rights, remediless at first for lack of a suitable writ or precedent in the *Registrum Brevium*, until the persistence of the demand for a *remedy* developed the action of trespass on the case as a general specific in *consimili causa*, under the provisions of the statute of Westminster II. The fol-

lowing cases also serve to illustrate the existence of this right of common law: *Firebrace*, 4 P. B. 63; *Yelveton*, 1 Siv. & Tr., 586; *Ormi*, 2 Add. Ex. 382; *Reg. v. Jackson*, 1 Q.B. 685."

The case goes on to cite *Lynch v. Knight*, 9 H. L. Cas. 577; 11 Irish Jurist, 284 as illustrating the endeavor of the English judges at that time to supply a remedy for a conceded, existing right; that is the wife's right to redress for loss of consortium or conjugal society. See also 3 Blac. Com. 94; *Orme v. Orme*, 2 Adams Eccl. Rep. 382; 1 Bishop, M., D. & S. secs 69, 1357; *Burrows v. Burrows*, 2 Swabey & T. 303.

It is universally recognized that the purpose of the Married Women's Acts was to place husband and wife on the same legal footing and to remove the procedural impediments with which the common law had shackled her. In recognizing this intention of the Acts, some courts have gone so far as to hold these Acts took away the husband's right to sue for loss of consortium. See 22 Univ. Mich. L. Rev., page 1, *supra*, in which Professor Holbrook criticizes these cases, and says that a much better result would be obtained by recognizing the right in the wife. There is no question but that he had the right at common law to sue for loss of his wife's consortium. If the law must be made symmetrical, let its symmetry embrace reason and justice.

In 1931, the question of whether the married women's acts gave a wife a right of redress for loss of consortium against one negligently injuring her husband was again before the Oregon Supreme Court in *Sheard v. Oregon Electric Ry. Co.*, 137 Or. 341, 2 P. 2d 916 (1931). The

plaintiff there contended that the decision in *Kosciolek v. Portland Ry. L. & P. Co.*, supra, which held that such an action could not be maintained, was weakened if not overruled by *Elling v. Blake-McFall Co.*, supra, and the principles of law employed in *Keen v. Keen*, supra.

The Court made a distinction between the allowance of recovery in a case of an intentional tort and that of a negligent tort upon damages, holding in the former the sole wrong or injury is to the wife and that she has a direct and not a derivative chose in action and the husband being in *pari delicto* could hardly be expected to maintain the action. In the latter, damage money paid to the husband assumes that all wrongs resulting from the negligent act will be righted. What the court failed to consider is that the wife, who has equal rights in the conjugal relationship, though she has theoretically been reimbursed for the impairment of the husband's ability to support her, her right to his society, love, assistance and a full and healthy family life has been interfered with or lost without redress.

The Court in the inconsistency of allowing the husband recovery in an action for the loss of consortium through the negligence of another but denying the right to the wife, notwithstanding the enabling statutes, did so on the basis of lack of precedent for holding otherwise and felt any change would have to be by legislative determination. On the same theory it would be necessary for the court to reverse itself in *Cowgill, Adm'r. v. Broock, Adm'r.*, 189 Or. 282, 218 P. 2d 445, where the administrator of an unemancipated child was allowed re-

covery for the gross negligence of his father in an action against the father's estate.

However, such a change was made by the legislative body by the Laws of 1941, ch. 228, ORS 108.010:

“All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband hereby are repealed; and all civil rights belonging to the husband not conferred upon the wife prior to June 14, 1941, or which she does not have at common law, hereby are conferred upon her, including, among other things, *the right of action for loss of consortium of her husband.*”

Since the amendment there have been two cases in which this statute, as amended has been considered. In *Smith v. Smith*, 205 Or. 286, 287 P. 2d 572 (1955) the court said:

“The provision granting to the wife the substantive right to sue for loss of consortium illustrates the purpose of the lawmakers to place her on a par with her husband. That enactment merely gave her the right which the common law had given to her husband.

“. . . the statute as it was before the 1941 amendment was held by this court to have conferred no new right of action upon a wife.”

In *Ellis v. Fallert, et al*, 209 Or. 406, 307 P. 2d 283 (1957) the plaintiff wife claimed a right to recover for loss of consortium through the alleged negligence of the defendant. Her husband had been injured while working for the defendants; they and the plaintiff's husband were all subject to the provisions of the Workmen's Compensation Law at the time of the injury. The court said:

“For the purposes of this case we shall assume (emphasis added) that if plaintiff’s husband was not under the Workmen’s Compensation Act, she would have a cause of action against the defendant for the negligent injury to her husband, resulting in loss of consortium, and that such right would be accorded to her under the provisions of ORS 108.010”

The court denied the plaintiff’s right to recover under the conditions of the case since the Workmen’s Compensation Law in ORS 656.152 (2) states:

“The right to receive such sums is *in lieu of all claims against his employer.*

and because of the fact the plaintiff’s husband had received additional compensation as a married claimant and by this fact distinguished it from *Hitaffer v. Argonne*, supra.

Though there has been no direct holding that a wife can recover for the loss of consortium due to the negligence of a third party in Oregon, such a conclusion is inevitable for the following reasons:

1. ORS 108.010, supra.

2. *Smith v. Smith*, supra, which found that the right of a wife to sue for loss of consortium is to be measured by the right which a husband has to sue for loss of consortium when his wife is *wrongfully* injured.

3. *Elling v. Blake-McFall*, supra, which allowed to the husband a right of recovery for the loss of consortium when his wife was injured by the negligence of the defendant.

4. The weakness in the court’s argument in cases de-

cided prior to the 1941 amendment to the statute in denying recovery to the wife.

5. The recent trend in others jurisdiction of allowing the wife redress without legislative enactment.

- (1) Cooney v. Moomaw, et al, USDCND 1953, 109 F. Sup. 448.
- (2) Hitaffer v. Argonne Co., 193 F. 2d 811 DC Cir (1950).
- (3) Missouri Pacific Transportation Co., v. Miller, 299 S. W. 2d 41 (Ark 1957).
- (4) Acuff v. Schmit, supra, 78 N. W. 2d 480 (Iowa 1956).
- (5) Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S. E. 2d 24.
- (6) Delta Chevrolet Co. v. Waid, 51 So. 2d 443 (Miss. 1951).
- (7) Grist v. French, 1955, 136 Cal. App. 2d 247, 288 P. 2d 1003; Deshotel v. Atchison, Topeka & Santa Fe Railway Co., 319 P. 2d 357, (Calif. 1957).
- (8) Best v. Samuel Fox & Co., 2 King's Bench 654, 2 All Eng. 116 (1951). Holding that the wife may recover for loss of consortium lost through the negligence of a third person if a *total loss of consortium*, but no recovery when only a loss of one element which goes to make up consortium resulted.

The action at bar is predicated neither upon the Jones Act nor the General Maritime Law. It is instituted on the theory of *negligence* or wrongful misfeasance or non-feasance; an action by the appellant to recover for damages she sustained independent of her husband. Appellant is suing in her own right, a right given

to her by ORS 108.010, and not as a subrogee or legal representative of the employee-husband. She does not come to this Court as an assignee of her husband but she comes in her own right to seek redress for injuries which she sustained due to the appellee's wrongful conduct. The wife's loss of companionship, solicitous care and sexual intercourse are personal to her and cannot be recovered by her husband's recovery.

The right of a spouse to consortium is a property right growing out of the marriage contract and includes the exclusive right to the society, companionship and conjugal affection of each other. *Valentine v. Polk*, 95 Conn. 560, 111 Atl. 869 (1920). At common law the same principles applying to the servant were applied to the wife. The husband's interest in his wife's consortium, unlike the parent's interest in the consortium of his children was considered to be *sufficiently proprietary* to support an action of trespass. This is quite distinct from the right which the husband had jointly with his wife to sue for wrongs committed against her. The latter right depended upon the incapacity of the wife to sue in her own name. 8 History of English Law (3d ed 1923) p. 429. The Oregon court in *Smith v. Smith*, supra, held that the right of the wife to sue for loss of consortium is to be measured by the right which a husband has to sue for loss of consortium when his wife is wrongfully injured. Based upon that decision then, the wife's present right to recover is the same as a husband had which was and is an independent wrong and not derivative. In this action if the appellant's right of consortium was not a separate right, the decision of the State court in *John-*

nie Jordan v. States Marine Corporation of Delaware would be res judicata as to the alleged negligence or wrongful conduct of the appellee, and as to the right of the appellant to a recovery herein, but this cannot be, inasmuch as the previous litigation was between different parties and involved a different right. Appellant's right exists by virtue of ORS 108.010 (supra). She has a substantive proprietary interest in the conjugal status or contract and the appellee's conduct was the incident of injury to her right which the state of the marital domicile protects against the wrongful interference by third parties. The State has a special interest in the marital status and it has long been the settled policy of the law to guard and maintain it (the marriage) with watchful vigilance. *Giddings v. Giddings, et al*, 167 Or. 504, 114 P. 2d 1009 (1941).

While it is true that the breach of duty by the appellee, which caused injuries to appellant's husband and allegedly caused an independent injury to the appellant, occurred while the appellee's vessel was at sea and while he, as a seaman, was employed in service on that vessel, it does not follow that the tort to the wife and the tort to the husband were both maritime torts.

Whether a tort is "maritime" and, therefore, within admiralty jurisdiction is ordinarily determined on the basis of whether it occurs on navigable waters or on land. *Frankel v. Bethlehem Fairfield Shipyard* (DC Md), 46 F. Supp. 242, 244. There is no question that the tort to the husband was a maritime tort. But the appellant was not at sea and the injury she sustained

was in the State of Oregon, the place of the parties marital domicile, which has granted to her a substantive right to recover for interference with her consortium by third parties. Her right was a continuing right, she did not leave the jurisdiction of the State or its courts to go into another jurisdiction. Therefore, the law of the State of Oregon has the exclusive power to finally determine and declare what act or omission in the conduct of another shall impose liability in damages for the consequential injury. The place of the injury to the appellant wife was Oregon and it is the law of that state which must control. *Forbes v. Forbes*, 152 Or. 691, 55 P. 2d 727. To apply the law of any other jurisdiction to this case would be the granting of extra-territorial affect to the law of that particular jurisdiction. In view of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the federal courts are bound to follow the law of the State of Oregon in this cause. See also *Cooney v. Moomaw*, supra.

“According to a universally settled rule,” Rable, *The Conflict of Laws, A Comparative Study*, Vol. II, page 346 (1st ed 1957), “ a tortious act done on board a vessel on the high seas, *whereby only persons or property on board are injured* is governed by the law of the flag the vessel flies.” *The Admiral Peoples*, 55 S. Ct. 885, 295 U.S. 649, 79 L. Ed. 1633 (1935). The appellant comes within the exception of the rule since she was not on board the SS COTTON STATE when she suffered her independent injury. Under the American rule of conflict of laws the place of the wrong is where the person or thing harmed is situated at the time of the wrong.

Beale, Vol. II Sec. 377.2. Or as stated in the Restatement of Conflict of Laws, Section 377:

“The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”

An unlawful and faulty act is not a tort until it creates an injury. Where the injury takes place is the place of the wrong. *Otey v. Midland Valley RR Co.*, 108 Kan. 755, 197 Pac. 203 (1921). The fact that the appellee's conduct occurred on the high seas does not oust the law of Oregon. *Hunter v. Derby Foods, Inc.* (2 CCA 1940), 110 F. 2d 970; *Anderson v. Linton*, 178 F. 2d 304 (7 CCA 1949); *Rundell v. LaCampagnie Generale Transatlantique* (7 CCA 1900), 100 F. 655. See also Beale, Conflict of Laws, Vol. II, Sec. 377.2: “Where the injury is caused not directly but as the result of a train of consequences, the place of injury presents more difficulty, but these difficulties disappear if one keeps in mind the fact that the right injured is that created by the law to protect the person or thing from the injury, and that the law is the law of the place where the person or thing is situated at the time of the injury.”

In *Westerberg v. Tide Water Associated Oil Co.*, 110 N. E. 2d 395, 1953 AMC 553, the wife of a seaman sued for loss of consortium arising from injuries sustained by her seaman husband while employed in the service of a vessel on the high seas. The New York Court of Appeals denied recovery to the wife stating that the alleged *breach of duty was a maritime tort* and as such cannot furnish as a basis for the action since recovery is not within

the purview of the Jones Act citing *Garrett v. Moore-McCormick Co.*, 317 U.S. 239, 1942, AMC 1645, as its authority. It is submitted that the Garrett decision does not preclude recovery by the appellant in the instant case since her suit is not "rested on asserted rights granted by federal law" but upon rights rooted in state law. Mr. Justice Holmes held in *The Hamilton*, 207 U.S. 398, 52 L. Ed. 264, 28 S. Ct. 133, that a claim for death on the high seas, arising purely from tort, could be maintained under the survival statute of the State of Delaware, though the *wrongful acts* operated outside the territory of the state, and though no such right was recognized in general maritime law. Recovery would be barred *only* if the national government under a power delegated to it by the Constitution of the United States qualifies the authority which the states would possess.

In *American Steamboat Co. v. Chase*, 16 Wall. 522, 21 L. Ed. 369, it was held that state courts can exercise jurisdiction and give a remedy for a consequential injury growing out of a maritime tort where no remedy for such an injury exists in the general maritime law. Under this decision, the appellant has a course of action even though the wife's right of redress for loss of consortium is recovery for a consequential injury growing out of a maritime tort to her husband where no remedy for such an injury exists in admiralty.

The appellant in her action is seeking redress for injuries she sustained due to the appellee's negligence, and neither the Jones Act nor the general maritime law is applicable. While the breach of duty as to the appel-

lant's husband which was the proximate cause of his injury was a maritime tort, appellant suffered an independent injury on *shore* and is not suing to recover damages sustained by her husband.

Respectfully submitted,

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**United States
COURT OF APPEALS
for the Ninth Circuit**

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF
DELAWARE, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

*On Appeal from the United States District Court for the
District of Oregon.*

FILED

MAY 7 1953

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APPELLANT'S REPLY BRIEF

*On Appeal from the United States District Court for the
District of Oregon.*

REPLY BRIEF OF APPELLANT
MARTHA JORDAN

The judgment entered in the court below should be reversed for the following reasons and in reply to Appellee's answering brief.

The injury to the Appellant was non-maritime; the "place of wrong" was Portland, Oregon.

The appellee cites the case of *Tate v. C. G. Willis, Inc.*, (D. Ct. E. D. Va. 1957), 154 F. Supp. 402 as

holding "that the *domiciliary administratrix* had no action against a shipowner for loss of her seaman-husband's consortium when negligently killed aboard a vessel by reason of the Court dismissing without comment libelant's second cause of action alleging loss of consortium." If that is the holding of the court, then the decision in no way conflicts with the appellant's contentions heretofore set forth. The appellant is suing in the case presently before the bar in her capacity as the wife of the injured seaman and that is the only capacity in which recovery for loss of consortium can be had, and certainly not in the capacity of a deceased seaman's administratrix, but as the widow of the deceased seaman. The court, upon the appellee's interpretation of the case, could have decided the case on this point alone. However, the appellant is of the opinion that since the title of the case is "Daphene P. Tate, as administratrix of the estate of George Archie Tate, deceased, and in her own right as widow, . . ." that in fact the court held that the plaintiff could not recover for loss of consortium in her capacity as the widow of her deceased husband, under the Jones Act. 46 U.S.C.A. 688. But, the case is distinguishable from the instant case since there the appellant's action was brought under the Jones Act. Also, the decision is weakened by the libelant's request, in their brief, that a non-suit be entered as to the second cause of action in which damages was sought for loss of consortium. The court held that under the Jones Act, there could be no recovery for loss of consortium without comment.

The appellee cites the Restatement, Conflict of Laws, Section 377, as a point of departure which reads,

“The *place of the wrong* is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”

It would seem then, that the appellee recognizes the Restatement as proper authority for determining the place of the tort as applicable to the instant case. In the comment (a) of this section, it is said:

“If *consequences* of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.”

The appellee contends that the courts which use the terminology “where the damage is done” or “where the harm ensued” rather than the phrase “the last event necessary,” do so in the physical impact cases where the *place* of damage and the *place* where the last event necessary to render the actor liable coincide. This is not an accurate statement as is pointed out in example 5 of Section 377, which does not involve a physical impact situation but injury to one’s reputation.

“Where harm is done to the reputation of a person, the place of the wrong is where the defamatory statement is communicated.”

As is stated in 86 C.J.S., Torts, Section 24,

“As to transitory torts, the law of the place where the injury is occasioned or inflicted governs in respect of the right of action. . . .”

In an action for fraud and deceit, the place of the wrong is the place where the loss is sustained. *Smyth Sales v.*

Petroleum Heat and Power Company (CCANJ), 128 F.2d 697, and authority cited therein.

Thus, it is seen that in non-physical impact cases the place of the wrong is the place where *the loss is sustained*.

Counsel for the appellee states that counsel for the appellant-wife would perhaps not have been confused by generalities expressed in cases nor contended that the place of the wrong in the case at bar was in Oregon, had counsel paid heed to an article written by Walter Wheeler Cook, *Tort Liability and the Conflict of Laws*, 35 Col. L. Rev. 202. It is submitted that counsel for the appellee, not counsel for the appellant-wife, is the one who is confused. First, the article was neither cited in the appellant's brief, nor read by counsel until he read the appellee's answering brief. Secondly, if counsel himself cared to cite the law as Mr. Cook found it he would have cited to the court the following language which appears at page 212 of the article:

"The fact remains that American courts do in general 'apply' the 'law', or, rather, purport to apply, the 'law' of the place where the 'harm occurs' rather than the place of acting."

Also, Mr. Cook's article is confined to a criticism of the Restatement in its present form so far as it relates to Tort obligations, which is the very work that the appellee cites for its authority.

See *The Russell No. 6*, 42 F. Supp. 904, which was a proceedings in admiralty which states that "tort jurisdiction in Admiralty depends upon the *locality of the*

injury, or occurrence, and does not extend to injuries caused to persons or property on the land where the state law is applicable.”

The appellee refers the court to the Restatement, Conflict of Laws, Section 391 and makes the point that the “place of wrong” for determining the right of action for the death is “not where pecuniary loss is caused to his relatives.” But the court’s attention is directed to Comment (b) which reads:

“It is the law of the place of wrong (see Section 377) and *not that of the place where the defendant’s conduct occurs* or the place of death which governs the right.”

Therefore, whether there is survival of the right to recover for damages incurred, depends upon the place where the damage was done or the harm ensued or the injury takes place, though the death of the injured party is a condition precedent to its accrual. While the action lies to recover damages for death, death does not constitute the tort. The fact of death is not the tort but the consequence of the tort. The loss to the surviving relatives, being derivative and not an independent tort, is controlled by the law of the place where the deceased was injured. In a death action what is in effect said, is that the injured party who has since died cannot maintain an action for the wrongful conduct of the tortfeasor, so his personal representative or designated beneficiaries may maintain the action and recover what the deceased could have recovered had he in fact survived.

The appellant-wife is seeking recovery for her independent loss of her husband’s society, love, assistance

and the natural right to bear children and to be a mother. These are the protected rights which the appellant has lost; her injured husband did not and could never recover damages for the independent loss his wife has suffered; being an independent wrong to the wife, her right of action is not derivative. The rule in negligence cases is that where in the natural and continual sequences, an injury is produced which, but for the negligent act would not have occurred, the wrongdoer will be liable, and under the applicable rule of conflict of laws, the place of the injury is the place of the wrong. Therefore, the law of Oregon prevails as to the appellant's cause, as she is seeking redress for a non-maritime tort.

The locality test is the rule applied for determination of admiralty jurisdiction, that is the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the act or omission produces such injury as to give rise to a cause of action. *The Plymouth* (1865), 3 Wall. 20, 18 L. Ed. 125; *Todd Shipyards Corp. v. Harbor Side Trading and Supply Company* (DCEDNY 1950), 93 F. Supp. 601; *Lacey v. L. W. Wiggins Airways, Inc.*, (D.C. Mass. 1951), 95 F. Supp. 916; *The Russell No. 6*, 42 F. Supp. 904; *Benedict Admiralty*, 128 (6th Ed. 1940).

Applying the State of Oregon's Married Woman's Act is merely giving territorial effect to the law of the "place of wrong."

The Oregon Married Women's Act (ORS 108.010) is not given extra-territorial effect as contended by appellee, but to the contrary enforces the right created by the state for an injury suffered by appellant within the state. Here the wrongful conduct originated outside the state, but the resulting injuries were sustained by appellant within Oregon. The place of the wrong is not extra-territorial. To apply the law of the State of Delaware would be giving extra-territorial effect to the law of that state under the circumstances of the instant case. The appellant was not constructively upon any territory of the State of Delaware (SS COTTON STATE), but rather wrongful conduct which occurred upon the constructive territory of Delaware resulted in direct injury to the appellant in Oregon.

Appellant's action does not encroach upon the uniformity or characteristics of maritime law.

Before the passage of the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C.A. 761-767, there was no question but what the state Wrongful Death Statutes did not encroach upon the uniform application of maritime law even though death occurred upon the high seas. *McDonald v. Mallory*, 77 N.Y. 546; *The E. B. Ward, Jr.* (1883, CCED La.), 17 Fed. 456; *The Hamilton* (1907), 207 U.S. 398, 52 L. Ed. 264. And only by the passage of this Act was the state law ousted; state law had controlled even though the tort involved was admittedly

maritime. If this did not constitute an interference with the uniform application of maritime law, how can it be properly urged that the application of state law to a non-maritime tort is such an interference as would necessitate the deprivation of appellant's right of recovery? This is a matter of local concern as between the appellant and the appellee and the independent right of recovery of the husband in no way changes the local character of *this* action.

The fact that ship owners have encroached upon seamen's wives right of consortium, without being held liable does not vindicate the appellee of liability to the appellant; where there is a right there is a remedy for an unwarranted interference with that right. A wife has the right to the society, companionship, love, assistance and sexual relation with her husband regardless of the calling of her husband. It makes little difference whether he be a seaman, a travelling salesman or a farmer.

Appellee says it is too late to say that appellant's action for loss of consortium merely supplements maritime law because Congress has pre-exempted the field.

The appellant is not contending that her cause of action for loss of consortium merely supplements maritime law, but rather that the tort involved is non-maritime.

Recovery by the appellant will not affect the uniform application of the Jones Act since appellant is not bringing her action under the provisions of that Act; she is not asserting a right granted by federal law,

but a right rooted in state law. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 1942 A.M.C. 1645. The breach of duty was not a maritime tort as to the appellant though her cause of action arose simultaneously with that of her seaman husband.

If it be held that the tort to the appellant wife be in fact a maritime tort, then there is authority for allowing recovery in an action of this nature.

In *Plummer v. Webb*, Fed. Case No. 11,233, 4 Mason 380 (1827), a libel was filed in admiralty in the nature of an action per quod servitium amisit. The libellant-father consented to a voyage to be made by his minor son. The son later died from mistreatment while subjected to an unauthorized voyage. The court held that a father may maintain a suit in admiralty for the tortious abduction of his minor son on a voyage on the high seas, but because the case was not wholly within the jurisdiction of admiralty remitted the parties to their action at *common law*.

The Sea Gull, Fed. Cas. No. 12,578 (1865), involved a collision which occurred just outside the port of Baltimore in which the libellant's wife was killed by the alleged fault of the *Sea Gull*; this was a libel in rem. The court after noting that the common law cases have held that personal actions die with the person, said that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." This same reasoning could apply to the appellant's claim for recovery for loss of consortium.

A father whose minor child had been injured on shipboard by a collision between two vessels in New York harbor sought and recovered damages for the loss of services of his minor son in *Moses v. Hamburg-American Packet Co., et al*, (DCSDNY 1898) 88 Fed. 329. The father filed a libel in personam.

In *New York and Long Branch Steamboat Co. v. Johnson, et al*, (CCA 3rd Cir. 1912), 195 Fed. 740, Mrs. Johnson was injured in a collision while a passenger on a steamboat enroute from New York to Long Branch. For alleged negligence in causing her injury she filed an action in the New Jersey state court. Her husband brought a similar suit for the injury sustained by him through said injury to his wife. The defendant filed a libel in admiralty for limitation of liability and both the husband and wife filed an answer to the libel, and both parties recovered damages. Mr. Johnson's claim was recoverable in admiralty.

Appellant-wife is not precluded from claiming damage for loss of her right of consortium merely because her husband is a sailor.

Appellee in its brief admits that the appellant has lost her right of consortium but contend that her loss is minimal. It is submitted that the appellee is arguing the amount of damages appellant has sustained and not whether her complaint states a cause of action.

However, it would seem that the faithful wife of a seaman would suffer a much greater loss than the wife of a homeguard husband who is absent from the home only about eight hours a day. The anxiety of waiting

for months for the return of her seaman mate and then to have him return in his disabled and non-functional condition, must be the epitome of frustration to a loving and devout wife. The desire for conjugal relations and society increase exponentially with the passage of time, or at least absence makes the heart grow fonder.

There is no evidence indicating that the appellant has permitted her husband to follow the sea and the appellee is merely speculating. But assuming arguendo that she did consent, it is a non-sequitur to say that she also consented to release her right to recover damages for the injury inflicted upon her by the wrongful conduct of a ship-owner.

WHEREFORE, the Appellant prays that this Court reverse the judgment entered below and that the cause be remanded to the trial court.

Respectfully submitted,

NELS PETERSON,
FRANK POZZI,
BERKELEY LENT,

901 Loyalty Building,
Portland 4, Oregon,
Proctors for Appellant.

No. 15839

United States
Court of Appeals
for the Ninth Circuit

ALDO CERATI,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED
JAN 22 1958

PAUL P. H. T. SM. CLERK

No. 15839

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1902-1903

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Post Office Building,

San Francisco, California,

For Appellee.

United States Department of Justice,
Immigration and Naturalization Service

Original—(To be retained by Clerk of Court)

United States of America

PETITION FOR NATURALIZATION

General Provisions

No. 128368

To the Honorable the District Court of the United
States, San Francisco, Calif.

This petition for naturalization, hereby made and
filed, respectfully shows:

(1) My full, true, and correct name is: Aldo
Cerati.

(2) My present place of residence is Spl. Serve.
Dept., U. S. Naval Station, Treasure Isl., San Fran-
cisco, Calif., U. S. Navy.

(4) I was born on June 8, 1935, in Novara, Italy.

(5) My personal description is as follows: Sex,
Male; complexion, Fair; color of eyes, Blue; color of
hair, Brown; height, 5 feet 9 inches; weight, 145
pounds; visible distinctive marks, Small scar back
left wrist; country of which I am a citizen, subject,
or national, Italy.

(6) I am not married.

(7a) (If petition is filed under section 319(a),
Immigration and Nationality Act.) I have resided
in the United States in marital union with my

United States citizen spouse for at least 3 years immediately preceding the date of filing this petition for naturalization, and have been physically present in the United States at least half of that time.

(7b) (If petition is filed under section 319(b), Immigration and Nationality Act.) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or subsidiary thereof or of a public international organization in which the United States participates; and such husband or wife is regularly stationed abroad in such employment. I intend in good faith upon naturalization to live abroad with my spouse and to resume my residence within the United States immediately upon termination of such employment abroad.

(8) I have no children.

(9) My lawful admission for permanent residence in the United States was at Miami, Florida, under the name of Aldo Cerati (formerly Aldo Cavallo), on August 2, 1951, on the PAA Flt No. 412.

(10) Since my lawful admission for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer.

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen.

(12) It is my intention to reside permanently in the United States.

(13) I am not and have not been for a period of at least 10 years immediately preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch affiliate or subdivision thereof nor have I during such period engaged in or performed any of the acts or activities prohibited by that Act.

(14) I am able to read, write and speak the English language (unless exempted therefrom).

(15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. I am willing, if required by law, to bear arms on behalf of the United States, to perform noncombatant service in the Armed Forces of the United States, and to perform work of national importance under civilian direction (unless exempted therefrom).

(16) I have resided continuously in the United States since August 2, 1951, and continuously in the

State in which this petition is made for the term of 6 months at least immediately preceding the date of this petition and I have been physically present in the United States for at least one-half of the 5-year period immediately preceding the date of this petition.

(17) I have not heretofore made petition for naturalization.

(18) Attached hereto and made a part of this, my petition for naturalization, are the affidavits of at least two verifying witnesses required by law.

(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America.

I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name: So Help Me God.

Alien Registration No. A8079012.

/s/ ALDO CERATI,

(Full, true, and correct signature of petitioner, without abbreviation.)

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

(1) My name is Edward Lewis, my occupation is U. S. Navy. I reside at 1231 Grove Street, San Francisco, California, and

(2) My name is Herbert H. Bessner, my occupation is Administrative Assistant. I reside at 2108 $\frac{1}{2}$ Byron Street, Berkeley, California.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with the petitioner named in the petition for naturalization of which this affidavit is a part, since at least June, 1956; to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned; that the petitioner has been physically present in the United States for at least 6 months of that period; and that the petitioner has been a resident in the State in which the petition is filed during at least the last 6 months. I have personal knowledge that the petitioner is, and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in the affidavit to this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

/s/ EDWARD LEWIS,
(Signature of Witness.)

/s/ HERBERT H. BESSNER,
(Signature of Witness.)

Subscribed and sworn to (affirmed) before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit at San Francisco, California, this 6th day of February, A.D. 1957.

/s/ J. S. HEMMER,
Designated Examiner.

I hereby certify that the foregoing petition for naturalization was by petitioner named herein filed in the office of the clerk of said court at San Francisco, California, this 6th day of February A.D. 1957.

[Seal] C. W. CALBREATH,
Clerk;

/s/ DOROTHY EDINGER,
For the Clerk.

Oath of Allegiance

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a

subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;

that I will bear arms on behalf of the United States when required by the law;

that I will perform noncombatant service in the Armed Forces of the United States when required by law;

that I will perform work of national importance under civilian direction when required by the law;

and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God. In acknowledgement whereof I have hereunto affixed my signature.

/s/ ALDO CERATI,

(Signature of Petitioner.)

Sworn to (affirmed) in open court, this .. day of
..... A.D. 19...

C. W. CALBREATH,
Clerk.

Petition denied: List no. Sept. 25, 1957.

In the District Court of the United States in and for the Northern District of California, Southern Division at San Francisco, California.

Petition No. 128368

Petition for Naturalization of ALDO CERATI.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF DESIGNATED NATURALIZATION EXAMINER

To the Honorable, the Judges of the District Court of the United States in and for the Northern District of California, Southern Division:

1. The undersigned, duly designated under the Immigration and Nationality Act of 1952, to conduct preliminary examinations upon petitions for naturalization, respectfully submits that this petitioner, age 21 years, a native and citizen of Italy, and who has resided in the United States since his admission to the United States for permanent residence on August 2, 1951, filed this petition for naturalization under the General Provisions of the Immigration and Nationality Act of 1952, on February 6, 1957.

Issue:

Whether the Petitioner Is Eligible for Naturalization in View of the Provisions of Section 315 of the Immigration and Nationality Act of 1952, He Having Applied for and Been Granted Exemption From Military Service Because of Alienage.

2. Statement of Facts

Petitioner was born on June 8, 1935, at Novara, Italy. He first came to the United States on April 23, 1950, in a temporary status as a student. He remained here in that status until July 1, 1951. He was readmitted to the United States at Miami, Florida, on August 21, 1951, for permanent residence, being 16 years of age at that time.

On attaining his 18th birthday or within five days thereafter, he became subject to registration for the draft under the Universal Military Training and Service Act (50 U.S.C.A., Sec. 454), in accordance with the terms of Presidential Proclamation No. 2799, of July 20, 1948 (13 F.R. 4173), which pertinently provided that "(j) Persons who were born on or after September 19, 1930, should be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." This would be within 5 days of June 8, 1953, or at the latest June 13, 1953.

Petitioner did not register until June 9, 1954. The reasons given for his delinquency are several—(1) Petitioner has stated that he consulted the Italian Consul at San Francisco, California, and was told by them that he had nothing to worry about until he attained his 20th birthday and that then he was to consult with the Consul at that time; (2) Petitioner alleges that he did not know of the draft until some of his school friends who were nearing their eighteenth birthday talked about the draft and about going into the Armed Forces; (3) Petitioner alleges

that in early June of 1954, he had contacted the Sacramento office of the Immigration and Naturalization Service in re the procuring of a re-entry permit in connection with a contemplated trip outside of the United States. He was informed by the Service that he would have to secure permission of the Draft Board before leaving the United States. He alleges that this was the first time he became aware that he was subject to draft registration.

Whatever the reason might have been, when he did appear to register he was reported to the U. S. Attorney's Office as delinquent. Investigation followed and when all of the facts were presented to the U. S. Attorney, he declined prosecution when the petitioner indicated that he accepted immediate induction. On June 19, 1954, he contacted his draft board and signed a request for immediate induction. After physical examination, he was advised on August 17, 1954, by his draft board that he was found acceptable for military service. On August 24, 1954, the petitioner with his stepfather, Charles N. Cerati, appeared at his draft board and presented two written requests for deferment until December 1, 1954, on the grounds that the petitioner was an indispensable employee of his father's business. They were informed that inasmuch as petitioner was being processed as a delinquent, the draft board could not grant any deferment. Petitioner and his stepfather thereupon requested an appeal.

On August 25, 1954, when the facts were presented to the U. S. Attorney, he requested the draft board

to induct subject immediately as a delinquent. The same day the draft board directed an order to the petitioner to report for induction as a delinquent on August 30, 1954. This order requested petitioner to report by 9:15 a.m. At 9:10 a.m., the petitioner, his stepfather and Mr. Vaughn, a Sacramento attorney, appeared at the local board and requested petitioner's exemption from military service on the grounds that he is an alien entitled to such exemption under the terms of a treaty between Italy and the United States. Their attention was called to the provisions of Section 315 of the Immigration and Nationality Act, which they all read, and petitioner was given Form C-294 "Application by Alien for Exemption from Military Service in the Armed Forces of the United States." While at the draft board, petitioner called attention to the fact that his induction notice had the word "Delinquent" on it and that this was objectionable to him since he was not a delinquent. He was informed that he was being processed as a delinquent at the request of the U. S. Attorney. Petitioner thereupon stated, "Well, nobody is going to push me around" and signed the Form C-294.

The facts were again called to the attention of the U. S. Attorney who again declined prosecution stating that while he did not feel that the petitioner acted in entire good faith, his claiming exemption as an alien reduced the possibility of his ever becoming a citizen of this country and that that would ultimately be sufficient punishment under the circumstances. Subsequently, the Draft Board, in accord-

ance with Selective Service Regulation No. 1622.42 (c), placed petitioner in a classification 4-C and exempted him from military service.

On January 31, 1956, the petitioner appeared at his draft board with a written letter signed by him alleging misunderstanding of his Application for Exemption from Military Service previously executed by him requesting consideration by the local board for his acceptance into the military service. To support this statement he also signed an application for voluntary induction the same date. On February 14, 1956, petitioner appeared before his draft board and requested that he be placed in Classification I-A so that he might go into the armed forces. He was ordered to report for induction on March 7, 1956. Following due process of this induction procedure, he was inducted into the United States Navy on March 7, 1956, at San Francisco, California, under Service Number 485-25-93.

The treaty referred to is the Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Italian Republic, signed at Rome, Italy, on February 2, 1948, and which entered into force on July 26, 1949. (63 Stat. 2255; TIAS 1965; 79 UNTS 171.)

The pertinent part of this Treaty is Article XIII, which provides as follows:

Article XIII.

1. The National of each High contracting Party shall be exempt * * * from compulsory training or

service in the armed forces of the other High Contracting Party and shall be also exempt from all contributions in money or in kind imposed in lieu thereof.

S. S. regulation No. 1622.42(c), under which this petitioner was exempted provided:

In Class 4-C shall be placed any registrant who is an alien and who is certified by the Department of State to be or otherwise establishes that he is, exempt from military service under the terms of a treaty or international agreement between the United States and the Country of which he is a national.

This regulation was implemented by Local Board Memorandum No. 39, as amended April 24, 1953, and issued by the National Headquarters of the Selective Service System, Washington, D. C. The text as here pertinent is as follows:

Local Board Memorandum No. 39.

Issued: November 6, 1951.

As Amended: April 24, 1953.

Subject: Classification of Treaty Aliens.

1. Purpose—

(a) Section 1622.42(c) of the Selective Service Regulations, which was prescribed by the President on September 25, 1951, provides that any registrant who is an alien and who is certified by the Department of State to be, or otherwise establishes that he is, exempt from military service under the terms of

a treaty or international agreement between the United States and the country of which he is a national shall be placed in Class IV-C.

(b) Section 315 of the Immigration and Nationality Act, which became effective on December 24, 1952, provides in pertinent part that “* * * any alien who applies or has applied for exemption * * * from training or service in the armed forces * * * of the United States on the ground that he is an alien, and is or was relieved * * * from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States and that “The records of the Selective Service System * * * shall be conclusive as to whether an alien was relieved * * * from such liability for training or service because he was an alien.”

(c) The purpose of this Local Board Memorandum is (1) to list the countries with which the United States has treaties exempting nationals thereof from military service; (2) to furnish information as to the evidence which must be submitted by or on behalf of a registrant who is a national of one of the countries so listed in order for him to be considered eligible for classification in Class IV-C under the provisions of Section 1622.42(c) of the regulations, and (3) (not pertinent).

2. List of Countries With Which the United States Has Treaties—

Any registrant, except a special registrant, who establishes to the satisfaction of his local board that

he is an alien and a citizen or national of one of the following countries is entitled to classification in Class IV-C under the provisions of Section 1622.42 (c) of the regulations, if he desires such classification, regardless of whether he has been admitted to the United States for permanent residence or is in the United States in a status other than that of a permanent resident, and regardless of whether he has declared his intention to become a citizen of the

United States:

Argentina

Austria

Costa Rica

China

El Salvador

Estonia

Germany

Honduras

Ireland

Italy

Latvia

Liberia

Norway

Paraguay

Siam

Spain

Switzerland

Yugoslavia

3. Evidence to be Considered—

(a) (1) In view of the provisions of Section 315 of the Immigration and Nationality Act, the Selec-

tive Service System should, in fairness to its registrants, make sure that an alien is not exempted from military service because of his alien status unless he personally desires such exemption. It is also important, as a matter of fairness to him, that he be fully advised as to the provisions of Section 315 of the Immigration and Nationality Act.

(2) Local boards should therefore require every alien who desires exemption from military service under a treaty to sign a statement that he requests exemption from military service on the ground that he is an alien claiming exemption under a treaty. As a matter of information to the registrant, it is desirable that the provisions of Section 315 of the Immigration and Nationality Act should appear on the same paper with such statement. The statement should then be filed in the registrant's cover sheet.

(3) Not Pertinent.

(4) (a) The alien's request for exemption from military service shall in every instance contain his Alien Registration Receipt Card number for purposes of identification.....

(b) Not pertinent.

(c) In the absence of any certification by the Department of State the local board should classify a treaty alien into Class IV-C when the evidence establishes to the satisfaction of the local board that the registrant is entitled to such classification except that the registrant shall not be so classified unless

the signed statement from the registrant required by subparagraph (a) is in the cover sheet. The passport or equivalent official document held by the alien registrant will ordinarily be sufficient to establish the country of which he is a citizen or a national. In any particular case where the local board deems that more information is necessary, the registrant will usually be able to obtain additional evidence as to his status either from the embassy or legation of the country of which he claims to be a national or from the Immigration and Naturalization Service.

Petitioner's application for exemption is contained on SS Form C-294 (Rev. 13 July, 53), as follows:

(Local Board No. 20)

Yolo County,

August 30, 1954,

317 2nd Street,

(Woodland, California.)

Application by Alien for Exemption From Military Service in the Armed Forces of the United States

I, Aldo Cerati, am a national of Italy; I am a registrant at Local Board No. 20, (City) Woodland, (County) Yolo, (State) California, my Selective Service Number is 4-20-35-264; my alien registration number is

A8 079 012;

I1 859 508.

1. I hereby apply for exemption from military service in the Armed Forces of the United States on the ground that I am an alien and am entitled to such exemption under the terms of a treaty between Italy and the United States.

2. I have read the provisions of Section 315, of the Immigration and Nationality Act of 1952, given below, and I fully understand the meaning thereof.

Dated at Woodland, California, this 30th day of August, 1954.

/s/ ALDO CERATI,

Signature of Registrant.

Section 315 of the Immigration and Nationality Act of 1952, provides: "Section 315(a) notwithstanding the provisions of Section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

3. Discussion and Authorities

Preliminarily, Congress has the power to enact a selective service or draft law either in time of war

or in time of peace (U. S. vs. Henderson, 180 F. 2nd 711, certiorari denied 70 S. Ct. 997), and it is within the power of Congress to call everyone to the colors, and no one under the jurisdiction of the sovereign nation, whatever his status, is exempt from military service except by the grace of the government (Local Draft Board No. 1 of Silver Bow County, Montana, vs. Connors, 124 F. 2nd 388.) There is then no question as to the constitutionality of the statute.

2. Treaty Aliens

As far as the treaty is concerned, the treaty exemption is from "compulsory training or service in the armed forces" which leaves open and unpre-scribed the procedure by which a person called to service may manifest his unwillingness to serve—if such be his state of mind—and thus obtain his release from any military obligation. As applied to a given individual, Article XIII is not automatic in the sense that the alien, if he is unwilling to render military service, may simply ignore a summons to service, or ignore the procedure set up or authorized by legislature enactment, whereby the alien may claim his exemption from compulsory military service by making a declaration to the proper authorities of his unwillingness to serve. Therefore, entirely consistent with the exemption contained in Article XIII of the treaty; Section 315 of the Immigration and Nationality Act provided that "any alien who applies for exemption from military service in the

armed forces of the United States on the ground that he is an alien and is released from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States." The permanent ineligibility part of the section is not in conflict with Article XIII of the treaty, and indeed nothing in the whole treaty purports to impose any limitation upon the power of the respective countries to formulate the conditions of eligibility for naturalization. (*Ballester vs. U. S.* 220 F. 2nd 399, Certiorari denied October 10, 1955, 350 U. S. 830.)

As the Supreme Court stated in reference to a similar provision of a treaty with Switzerland: "That the statute unquestionably imposed a condition on exemption not found in the treaty does not mean that they are inconsistent. Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purpose and subject matter of the treaty. The treaty makes no provision respecting citizenship." (*Moser vs. U. S.* 3414 S 41.) We do not stop to labor the point, for even if the bar to naturalization were inconsistent with the provisions of the treaty, it is perfectly well-settled that provisions of a subsequent act of Congress, may for purposes of domestic law, supercede inconsistent provisions of a prior treaty with a foreign country. (*Head Tax Money Cases*, 112 U. S. 580, *Clark vs. Allen*, 331 U. S. 503.)

3. Alleged Misunderstanding

There is no showing that the petitioner did not fully understand the effect of his avoidance of service in the military forces of the United States.

There is some intimation that he was acting in accordance with the advice of the Italian Consul. This was the claim of the petitioner in the case of *Savoretti vs. Small* (U. S. Court of Appeals for the Fifth Circuit, No. 16252, May 1, 1957). The Court disposed of this claim in the following language:

“Asserting that he was acting pursuant to directions from the Consul of Argentina in claiming his exemption from military service, he contends that this deprived his act of its voluntary character. If Small felt under the obligation to follow such directions, we cannot say that he would thereby be permitted to avoid the effect of his claimed right to escape duty to the United States. Whatever may be the effect of directions given by a consular officer to a national of his government, they cannot alter the status of an alien within the United States or change the operation of its laws as they effect such alien. There was no coercion such as would, in contemplation of law, deprive the act of Small of its voluntary character. Cf. *Petition for Naturalization of Edward Coronado*, D.C. E.D. N.Y., 132 F. Supp. 419, aff. 2 cir. 1955, 224 F. 2d 556; *In re Ballester*, D.C. Puerto Rico, 1954, 119 F. Supp. 629, aff. *Ballester vs. United States*, 1 cir. 1955, 220 F. 2d. 399.”

Here the petitioner, on the occasion of his signing the Claim of Exemption, was accompanied to the

Draft Board by his stepfather and an attorney at law. The provisions of Section 315 were called to all of their attentions at the time. Form C-294, which petitioner signed, contains the allegation that "I have read the provisions of Section 315 of the Immigration and Nationality Act of 1952, given below, and I fully understand the meaning thereof." The full text of the section is set out in the form itself. The petitioner could read and write English and had the benefit of the advice of his stepfather and his lawyer. Under the circumstances, any allegation of lack of misunderstanding would be entirely fatuous.

4. Subsequent Service

There remains the question as to what effect, if any, his subsequent military service has upon his claim for exemption. Section 315 contains no exception for treaty aliens and apparently intended none. "This section would seem clearly enough to constitute an absolute bar to citizenship, even for a person who had petitioned for naturalization prior to the effective date of the Act (the Immigration and Nationality Act of 1952), and regardless of whether exemption from military service was sought and obtained under the regulations prescribed by the President * * * or by virtue of an exemption contained in a treaty." *Ballester vs. U. S. supra*. When the petitioner in the *Ballester* case received his notice to report for preinduction examination, he at first sought unsuccessfully to invoke the provisions of a treaty between the United States and Spain,

without executing the prescribed Selective Service Form for claiming exemption. However, he was informed by his draft board that he would either have to execute the Form or else prepare for induction. On November 2, 1944, Ballester executed the Form and was placed by his draft board in category IV-C. A little over a year later he was reclassified IV-A (over the age of liability for military service). He filed a petition for naturalization on December 16, 1952. The question was whether in applying for relief from military service he rendered himself ineligible for subsequent naturalization. The Court held that Section 315 was an absolute bar and denied his petition. This decision was affirmed on appeal and certiorari denied on October 10, 1955, 350 U.S. 830.

When the petitioner in the case of *In Re Mauderli* 122 F. Supp. 241, reported to his draft board, he claimed exemption on the ground that he was a member of the Reserve of the Swiss Army. When he got nowhere with this claim, he signed the DSS Form requesting relief from military service as a treaty alien based on the provisions of a treaty between the United States and Switzerland. His application was granted and he was placed in Class IV-C. Subsequently, he sought the advice of the Swiss Legation in Washington, D. C. When he advised the Legation that he had signed the regular DSS Form, he was instructed to withdraw it and to file a revised form from which the provisions that the making of the claim for exemption disqualified him for United

States citizenship had been eliminated. He was unsuccessful in his attempt to withdraw the original form and thereupon filed the revised form.

Subsequently, he petitioned for naturalization. The Service recommended that the petition be denied, contending that he was ineligible under Section 315. The Court in denying the petition held that Section 315 was applicable and controlling and stated that "The intent of Congress by the adoption of this section and plain language of Section 315 was so clear that there is no need to labor the point." For, as pointed out in the case of *Petition of Valasquez*, 139 F. Supp. 790, "Congress nowhere provided for the withdrawal of a claim of exemption once filed, nor that the bar to citizenship would be removed by subsequent eligibility for service." (Valasquez attempted to withdraw his claim of exemption about two weeks later.)

Again in the case of *Brownell vs. Rasmussen*, 235 F. 2nd 527, the petitioner had a declaratory judgment in the District Court that he "is not ineligible for citizenship upon the ground that he claimed exemption" from liability for service under the Selective Training and Service Act of 1940, as a neutral alien and accordingly was not subject to deportation. The Court of Appeals reversed on the ground that the District Court was without jurisdiction to review a deportation order other than in a habeas corpus proceeding. The U. S. Supreme Court (350 U.S. 806) reversed the Court of Appeals without opinion and remanded the case for consideration on

the merits. One of the facts in the case was that the petitioner had offered himself for induction while the war was still going on. In denying the petition, the Court of Appeals (235 F. 2nd 527) held that the petitioner's action in this regard does not overcome the effect of his earlier application for relief. (It is noted that the Supreme Court granted certiorari on March 25, 1957.)

Finally, we feel that our conclusion in this case is buttressed by a decision handed down by the United States District Court for the Southern District of New York—Petition of S—No. 614454, October 21, 1953. In that case, the petitioner for naturalization was lawfully admitted for permanent residence. In 1950, he applied for and was granted exemption from military service on the grounds of alienage. Subsequently, he was inducted into the United States Armed Forces, under the provisions of the Universal Military Training and Service Act of 1951. In denying his petition, the Court said:

* * * there is, unfortunately, no discretion residing in this Court to grant his petition. Under Section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, as well as under 4(a) of the Selective Service Act of 1948, 50 U.S.C. App. 454(a), he is ineligible for citizenship. This petitioner's predicament might well merit legislative intervention. But this Court is powerless to aid him.

4. Pursuant to the provisions of Section 335 of the Immigration and Nationality Act, I hereby make

the following findings of fact and conclusions of law:

Findings of Fact

I.

That the petitioner is an alien and filed a petition for naturalization on February 6, 1957, under the General Provisions of the Immigration and Nationality Act of 1952;

II.

That the petitioner became subject to draft registration between June 8-13, 1953, under the provisions of the Universal Military Training and Service Act and in accordance with the terms of Presidential Proclamation No. 2799, of July 20, 1948;

III.

That the petitioner did not present himself for registration to his Draft Board until June 9, 1954;

IV.

That the petitioner was ordered by his Draft Board to report for induction on August 30, 1954, as a delinquent;

V.

That on August 30, 1954, petitioner applied for and was relieved from military service because of alienage;

VI.

That there is no showing that the petitioner did not fully understand the effect of his application for relief from military service;

VII.

That on February 14, 1956, petitioner appeared before his Draft Board and requested immediate induction;

VIII.

That on March 7, 1956, petitioner was inducted into the United States Navy at San Francisco, California.

Conclusions of Law

I.

That the petitioner did apply for and was exempted from training and service in the Armed Forces of the United States on the ground that he was an alien;

II.

That under the provisions of Section 315 of the Immigration and Nationality Act of 1952, petitioner is permanently ineligible to become a citizen of the United States.

5. It is recommended that this petition be denied upon the ground that the petitioner is ineligible for citizenship by virtue of the provisions of Section 315 of the Immigration and Nationality Act of 1952, having applied for and been relieved from military service because of alienage.

Respectfully submitted,

/s/ DANIEL H. LYONS,

Designated Naturalization
Examiner.

July 24, 1957.

[Endorsed]: Filed July 24, 1957.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated that the following documents may be introduced in this matter without objection as exhibits of the Government:

(1) Certified copy of Application for Voluntary Induction of the petitioner dated June 9, 1954;

(2) Certified copy of Order to Report for Induction of the petitioner, dated August 30, 1954.

JACKSON & HERTOGS,

By /s/ GORDON G. DALE;

IMMIGRATION & NATURALIZATION SERVICE,

By /s/ DANIEL H. LYONS.

August 29, 1957.

Selective Service System Application for Voluntary Induction

I hereby apply for voluntary induction into the Armed Forces of the United States under the provisions of the Universal Military Training and Service Act, as amended. For this purpose, I waive all rights of personal appearance and appeal if I am classified as available for service, and I consent to

my induction at any time convenient to the Government.

My Selective Service number is 4-20-35-264.

My Local Board is No. 20 at 317 2nd St., Woodland, Calif.

I was born June 8, 1935.

My mailing address is Rt. 2, Box 5948, West Sacramento.

/s/ ALDO CERATI,
(Signature of registrant)

(Date of application): 6-9-'54.

“Received: June 9, 1954, Sacramento Local Board Gr.”

Certified a True Copy.

Selective Service System
Order to Report for Induction

Local Board No. 20

Delinquent

Yolo County

26 August, 1954.

Aug. 26, 1954

317 2nd St.,

Woodland, California

The President of the United States,

To: Aldo Cerati.

(Selective Service Number): 4-20-35-264.

Mailing address: Rt. #1, Box 5948, West Sacramento, California.

Mailing address: Rt. #1, Box 5948, West Sacramento, California.

Greeting:

Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the Armed Forces of the United States, you are hereby ordered to report to the Local Board named above at Pacific Greyhound Bus Lines, 713 Main Street, Woodland, California (Monday), at 9:15 a.m., on the 30th of August, 1954, for forwarding to an induction station.

/s/ MARION J. BAILEY,
Clerk of Local Board.

Important Notice

If you have had previous military service, bring your service records with you. If you wear glasses, bring them with you.

This Local Board will furnish transportation to the induction station where you will be examined, and, if accepted for service, you will then be inducted into a branch of the Armed Forces. If you are not accepted, return transportation will be provided.

Persons reporting to the induction station in some instances are found to have developed disqualifying defects since being examined and may be rejected for these or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any un-

due hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Wilful failure to report promptly to this Local Board at the place specified above and at the hour and on the day named in this Order is a violation of the Universal Military Training and Service Act, as amended, and subjects the violator to fine and imprisonment. You must keep this form and bring it with you when you report to the Local Board. Bring with you sufficient clothing for 3 days.

If you are so far removed from your own Local Board that reporting in compliance with this Order will be a serious hardship and you desire to report to a Local Board in the area in which you are now located, go immediately to that Local Board and make written request for transfer of your delivery for induction, taking this Order with you.

Certified a True Copy.

[Endorsed]: Filed August 29, 1957.

In the United States District Court for the Northern District of California, Southern Division

No. 128,368

In the Matter of:

ALDO CERATI, Petition for Naturalization

ORDER DENYING PETITION
FOR NATURALIZATION

The Immigration and Naturalization Service recommends denial of the petition of Aldo Cerati for naturalization on the ground that he is statutorily ineligible for naturalization because he applied for and was granted exemption as an alien from service in the Armed Forces of the United States.

Petitioner is a native of Italy. In 1951, when he was 16 years of age he was admitted to the United States for permanent residence. On attaining his eighteenth birthday in June, 1953, he failed to register for the draft as required by the Universal Military Training and Service Act, 62 Stat. 604, 50 USC Appendix §§ 451 et seq. and the regulations promulgated thereunder. On June 9, 1954, he registered with his local board, explaining that he had not previously been aware of his responsibilities under the Universal Military Training Act. Prosecution for the delinquent registration was declined by the United States Attorney upon the understanding that petitioner would accept immediate induction. Petitioner filed a request for immediate induction with his local board, and after examination,

was advised by the board that he was acceptable for military service. A few days thereafter, petitioner applied for a deferment on the ground that he was an indispensable employee of his stepfather's business. The deferment was denied and he was ordered to report for induction on August 30, 1954. On that day he appeared with his stepfather and an attorney at the office of the local board and requested exemption from military service pursuant to a treaty between the United States and Italy. Petitioner's attention was called to Section 315 of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 USC 1426 which provides that any alien who applies for and is granted exemption from service in the armed forces on the ground that he is an alien shall be permanently ineligible for citizenship. Petitioner then executed Form C-294 "Application by Alien for Exemption from Military Service in the Armed Forces of the United States," on the face of which Section 315 is set forth in full. His local board thereafter exempted him from military service as an alien.

About a year and a half later, on January 31, 1956, petitioner filed with his local board a request for voluntary induction and a letter claiming that he had misunderstood his Application for Exemption from Military Service. In accordance with his request, petitioner was subsequently inducted into the United States Navy, in which he is now serving.

Petitioner urges that because of his present active service in the armed forces of the United States,

Section 315 of the Immigration and Nationality Act of 1952 does not bar his naturalization.

Section 315 states that: "any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training on such ground, shall be permanently ineligible to become a citizen of the United States." Petitioner falls squarely within the statute. He filed a considered application for exemption on the ground of alienage and on the strength of such application was relieved from service in the armed forces on the very day he had been ordered to report for induction.

The statute makes no provision for the restoration of eligibility for citizenship in the event an alien, who has been granted exemption from service, subsequently enters the armed forces. Nothing has been called to the attention of the Court which would indicate that the Congress intended that an exempted alien may regain his eligibility for citizenship by service in the armed forces at such time as he sees fit.

This is not a case of involuntary conduct held to be remediable in analogous situations arising under the immigration and nationality laws. e.g., *Delgado v. Carmichael*, 332 U.S. 388 (1947); *Morizumi v. Acheson*, 101 F. Supp. 976 (N.D., Calif. 1951). Nor, is it a case of action taken under a misappre-

hension of its consequences and promptly retracted. The facts of this case show that petitioner deliberately and consciously elected to take the step which shut the door to future citizenship. Thus Section 315 must be applied.

The petition of Aldo Cerati for naturalization is denied.

Dated: September 25, 1957.

/s/ LEWIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 26, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the Petitioner has appealed to the United States Circuit Court of Appeals, for the Ninth Circuit from the judgment of this court entered.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, United Pacific Insurance Company, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Petitioner, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such

costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred-Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof the above-entitled Court, may proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of Section 73C of the Federal Rules of Civil Procedure.

In Witness Whereof, the corporate seal and name of the said Surety Company, it hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 22nd day of November, 1957.

UNITED PACIFIC
INSURANCE COMPANY,

By /s/ M. CULLEN,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On November 22, 1957, before me, Mary Black, a Notary Public in and for said City, County, and State, personally appeared M. Cullen, known to me

to be the person who executed the within instrument as Attorney-in-Fact on behalf of the United Pacific Insurance Company, and acknowledged to me that said corporation executed the same.

[Seal] /s/ MARY BLACK,
Notary Public in and for Said
City, County, and State.

My Commission Expires November 12, 1960.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 22nd day of November, 1957, that Aldo Cerati hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of this Court which was filed and entered on the 26th day of September, 1957, in favor of the defendant and against the said Aldo Cerati, petitioner.

JACKSON & HERTOGS,
Attorneys for Petitioner,

By /s/ GORDON G. DALE.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are originals and copies of papers filed in this Court in the above-entitled matter and constitute the record on appeal herein, as designated by counsel for the appellant:

Photostate copy of petition for Naturalization.

Order Denying Petition for Naturalization.

Findings of Fact, Conclusions of Law and Recommendation of Naturalization Examiner.

Stipulation for Introduction of Documents at Hearing.

(a) Copy of Application of Voluntary Induction.

(b) Copy of Order to Report for Induction.
Notice of Appeal.

Bond on Appeal.

Designation of Record on Appeal.

Respondent's Exhibits A, B, C, D, E, and F.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 30th day of December, 1957.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ MARGARET P. BLAIR,
Deputy Clerk

[Endorsed]: No. 15839. United States Court of Appeals for the Ninth Circuit. Aldo Cerati, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 30, 1957.

Docketed January 6, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15839

ALDO CERATI,

Appellant,

vs.

BRUCE G. BARBER, as District Director, San
Francisco District, Immigration and Naturali-
zation Service,

Appellee.

DESIGNATION OF RECORD TO BE INCOR-
PORATED IN TRANSCRIPT ON APPEAL

Appellant, Aldo Cerati, by and through his at-
torneys, Jackson and Hertogs, in the above-entitled
matter (in accordance with Rule 75(a) of the Fed-
eral Rules of Civil Procedure and Rule 75(a) of
the General Equity Rules, hereby designates the
entire record in the above-entitled matter to be
included in the Transcript on Appeal on its pend-
ing appeal from the judgment made, filed and en-
tered in said matter September 26, 1957.

Dated: January 7, 1958.

JACKSON & HERTOGS,
Attorneys for Appellant,

By /s/ JORDON G. DALE.

[Endorsed]: Filed January 8, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THE ABOVE-ENTITLED MATTER

Comes now, Aldo Cerati, by and through his attorneys, Jackson & Hertogs, and files herein the Statement of Points on which appellant intends to rely in the appeal of the above-entitled matter:

I.

That the District Court erred in concluding that one serving on active duty with the Armed Forces of the United States is ineligible to citizenship because of Section 315 of the Immigration and Nationality Act of 1952 (66 Stat. 242, 8 U.S.C. 1426).

II.

That the District Court erred in denying appellant's petition for naturalization.

Dated: January 7, 1958.

JACKSON & HERTOGS,
Attorneys for Appellant,

By /s/ GORDON G. DALE.

No. 15841

United States
Court of Appeals
For the Ninth Circuit

JOGINDAR SINGH CLAIR,

Appellant,

vs.

BRUCE G. BARBER, as District Director of Im-
migration and Naturalization Service, San
Francisco District,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED
JAN 31 1958
PAUL P. SHEN, CLERK

No. 15841

United States
Court of Appeals
For the Ninth Circuit

JOGINDAR SINGH CLAIR,

Appellant,

vs.

BRUCE G. BARBER, as District Director of Im-
migration and Naturalization Service, San
Francisco District,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

LLOYD H. BURKE,
United States Attorney;

CHARLES ELMER COLLETT,
Assistant United States Attorney,
Post Office Building,
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Counsel for Appellee.

ROBERT B. McMILLAN, ESQ.,
625 Market Street,
San Francisco, California,

MESSRS. PHELAN AND SIMMONS,
ARTHUR J. PHELAN, ESQ.,
1210 Mills Tower,
San Francisco, California,
Counsel for Appellant.



In the United States District Court for the Northern
District of California, Southern Division

No. 36388-Civil

JOGINDAR SINGH CLAIR,

Plaintiff,

vs.

BRUCE G. BARBER as District Director of Im-
migration and Naturalization Service, San
Francisco District,

Defendant.

EXCERPT FROM DOCKET ENTRIES

1957

Apr. 25—Filed complaint—Issued summons.

* * *

May 12—Filed answer of deft.

Aug. 20—Filed notice & motion by deft. to submit
case on administrative record, Aug. 26,
1957.

Aug. 26—Ord. motion to submit case on adminis-
trative record cont'd. to Aug. 30, 1957.

Aug. 30—Ord. case cont'd. to Sept. 20, 1957, for
subm.

* * *

Sept. 20—Ord. case submitted on administrative
record.

* * *

Oct. 28—Filed memo. order for judgment for deft.
Counsel to present findings, conclusions
and judgment.

* * *

1957

Nov. 29—Filed findings & conclusions.

Nov. 29—Entered judgment—filed Nov. 29, 1957—
plaintiff entitled to no relief and com-
plaint dismissed. Deft. to recover \$20.00
costs.

Nov. 29—Mailed notices.

Dec. 10—Filed notice of appeal.

Dec. 10—Filed appeal bond in sum of \$250.00.

Dec. 11—Mailed notices.

Dec. 20—Filed appellant's designation of record
on appeal.

—

In the United States District Court for the North-
ern District of California, Southern Division

No. 36388

JOGINDAR SINGH CLAIR,

Plaintiff,

vs.

BRUCE G. BARBER as District Director of Im-
migration and Naturalization Service, San
Francisco District,

Defendant.

COMPLAINT

I.

This action arises under Section 10 of the Admin-
istrative Procedure Act (5 U.S.C. 1009) and under
the Declaratory Judgment Act (28 U.S.C. 2201), as
hereinafter more fully appears.

II.

Plaintiff is a citizen of India and has resided continuously in the United States for more than sixteen years, to wit: Since the 27th day of August, 1940, on which date, plaintiff arrived in the United States as a seaman aboard the steamship "Grant," a vessel of British registry.

III.

At all times during the proceedings hereinafter mentioned, Defendant Bruce G. Barber was the duly appointed and acting District Director of the Immigration and Naturalization Service of the United States Department of Justice, and was in charge of the San Francisco District of said service.

IV.

Defendant has instituted a deportation proceeding against plaintiff by the issuance of a warrant of arrest in said proceeding, and pursuant to said warrant of arrest, a purported hearing was held in said deportation proceeding by Special Inquiry Officer, Robert S. DeMoulin, and during said hearing, plaintiff filed an application for suspension of deportation under the provisions of Section 244 (a) (1) of the Immigration and Nationality Act of 1952 (8 U.S.C. Section 1254 (a) (1)).

V.

There is annexed hereto, marked "Exhibit A," and made a part hereof, a true copy of the decision and order of said Special Inquiry Officer, entered

on December 14, 1955, denying plaintiff's said application for suspension of deportation and directing that plaintiff be deported if plaintiff failed to depart from the United States.

VI.

Following the entering of said order, plaintiff duly appealed from said order to the Board of Immigration Appeals at Washington, D. C., and there is annexed hereto, marked "Exhibit B," and made a part hereof, a true copy of the decision of said Board of Immigration Appeals, entered on January 20, 1956, directing that plaintiff's appeal be dismissed.

VII.

As will more fully appear from the said exhibits, the Board of Immigration Appeals has found that plaintiff came into the United States on an allied merchant vessel during the war, left his ship, and did not engage in seaman service during the remainder of hostilities, and has denied plaintiff's application for suspension of deportation on the sole basis of these facts so found, as aforesaid.

VIII.

By reason of the premises, plaintiff has been denied a fair hearing of his application for suspension of deportation and has been denied due process of law in said denial of his said application, and said decisions of said Special Inquiry Officer and said Board of Immigration Appeals are contrary to law and in excess of the statutory jurisdiction and authority of said Special Inquiry Officer

and said Board in the following particulars, to wit :

(1) The ground stated by said Board for denial of plaintiff's application for suspension of deportation is insufficient as a matter of law in that said ground so alleged bears no relationship to the statutory requirements for the granting of suspension of deportation ;

(2) The said finding of the Board of Immigration Appeals that plaintiff came to the United States on an allied merchant vessel during the war is unsupported by substantial evidence, or any evidence, and is contrary to the evidence, in that plaintiff came to the United States more than one year before the United States entered the war and before the United States had any allies in said war ;

(3) Said action of said Board in denying plaintiff's application for suspension of deportation on the basis of said findings and conclusions as found in said exhibits is arbitrary, capricious, and an abuse of discretion, and not in accordance with law, in that said action is based upon an arbitrary and unreasonable classification by discriminating against plaintiff on the sole ground that he arrived in the United States on a vessel of British registry, rather than upon a vessel of some other nation ;

(4) Said action of said Special Inquiry Officer and said Board is in excess of their statutory jurisdiction, authority, and limitations in that said Special Inquiry Officer and said Board prescribed a standard and requirement for granting suspension

of deportation which is not sanctioned by the applicable statutory provisions and which is unwarranted by the facts.

IX.

Plaintiff has exhausted his administrative remedies and defendant now threatens to deport plaintiff from the United States in accordance with the aforesaid decisions of the said Special Inquiry Officer and said Board of Immigration Appeals.

Wherefore, plaintiff prays that judgment be entered in his behalf, setting aside the said order of deportation and the findings and conclusions of said Special Inquiry Officer and said Board of Immigration Appeals and declaring plaintiff's right to have said application for suspension of deportation determined without reference to the fact that he arrived in the United States aboard a vessel of British registry, and for such other and further relief as may be deemed by the Court to be just and proper.

/s/ ROBERT B. McMILLAN,

PHELAN & SIMMONS,

By /s/ ARTHUR J. PHELAN,

Attorneys for Plaintiff.

EXHIBIT A

United States Department of Justice
Immigration and Naturalization Service

September 21, 1955.

December 13, 1955.

File: A5 468 333, San Francisco.

In Re: Jogindar Singh Clair a/k/a Hasin Brams.

In Deportation Proceedings

in Behalf of Respondent:

Boyd H. Reynolds, Attorney at Law,
1014-8th Street,
Sacramento, California.

Charges:

Warrant: I & N Act—Entered without inspection.

Lodged: I & N Act—Act of 1924—No immigration visa.

Application: Suspension of deportation.

Detention Status: Released on bond.

Warrant of Arrest Served: February 1, 1955.

Discussion:

This record relates to a 36-year-old married male, a native and citizen of India who last entered the United States at the Port of Norfolk, Virginia, August 27, 1940, as a member of the crew of the SS "Grant," at which time he claims to have been ad-

mitted as a seaman. The respondent testified that it was his intention to desert his vessel upon arrival and that he came to the United States to work and to reside permanently although he did not have an immigration visa. On the basis of this evidence the respondent is found to be subject to deportation on the lodged charge which will be fully sustained.

The warrant of arrest in this case, containing the entered without inspection charge, was issued on the basis of a sworn statement made before an Immigration Officer at Stockton, California, March 12, 1948, wherein he claimed that his last entry was ten miles east of Calexico, California, June 26, 1924, without inspection. During the course of his hearing, the respondent admitted that that information was false and was given to the Immigration Officer in an effort to prevent the issuance of a warrant of arrest and to prevent deportation. The warrant charge cannot be sustained on the basis of the respondent's testimony at time of hearing.

The respondent has submitted an application for suspension of deportation under Section 244 of the Immigration Act of 1952. He is married but his wife and one son reside in India. He alleges that he has been sending between \$100 and \$200 per year for their support. He is employed as a farm laborer and crew foreman, earning \$60 per week. His assets consist of \$500 in cash savings and personal property valued at \$1,000. In addition the respondent is his own bondsman and has placed a \$1,000 Treasury Bond as collateral. A check of local and federal rec-

ords has failed to disclose that the respondent has any criminal record or that he is a member of any subversive groups or organizations. He has submitted affidavits and testimonials indicating that he is, and has been, a person of good moral character for more than the past 5 years. It is to be noted that the false testimony which he gave before an Immigration Officer at Stockton on March 12, 1948, is outside the statutory period during which the respondent is required to show that he has been a person of good moral character. Although the respondent's arrival in the United States on the vessel claimed has not been verified, that apparently is because the respondent is uncertain as to the actual name of the ship on which he arrived. In any event, he testified that the vessel did arrive at Norfolk, Virginia, on the date claimed, August 27, 1940, and that it was a British Flag Ship. It is to be noted that the respondent deserted an allied ship during a period when the United States was endeavoring to aid Great Britain during World War II and when every available seaman was sorely needed. The respondent has no close relatives in the United States. Furthermore, he has presented no evidence which would show that deportation in his case would result in exceptional or extremely unusual hardship to anyone. On the basis of the evidence, it is concluded that the respondent is not eligible for suspension of deportation. His application must be therefore and hereby is denied. It is found that the respondent is statutorily eligible for the privilege of voluntary departure. It is not known whether or not the respondent

will accept voluntary departure or is willing to depart voluntarily at his own expense. However, it is believed that he should be given an opportunity to do so and voluntary departure will therefore be authorized.

The respondent testified that he was properly registered under the Alien Registration Act and also that he registered for military service in the United States in 1941. However, no evidence was presented and it is not known at what local board the respondent was registered. He has indicated that in the event of deportation, he would desire to be returned to India. In this connection, it is noted that the record discloses that the respondent is of the Hindu Faith.

Findings of Fact

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of India;

(2) That the respondent last entered the United States at the Port of Norfolk, Virginia, on or about August 27, 1940, as a member of the crew of a vessel named as the SS "Grant";

(3) That at the time of entry, it was the respondent's intention to work and reside in the United States permanently;

(4) That the respondent did not have in his possession an immigration visa.

Conclusions of Law

Upon the basis of the foregoing findings of facts, it is concluded:

(1) That under Section 241(a)(2) of the Immigration and Nationality Act, the respondent is not subject to deportation on the ground that, he entered the United States without inspection;

(2) That under Section 241(a)(1) of the Immigration and Nationality Act, the respondent is subject to deportation on the ground that, at the time of entry, he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: An immigrant not in possession of a valid immigration visa, in violation of Section 13(a) of the Act of May 26, 1924, and not exempt from the presentation thereof by the said act or regulations made thereunder.

Order: It is ordered that the respondent be granted voluntary departure at his own expense in lieu of deportation within such period of time or authorized extensions thereof and under such conditions as the District Director or the Officer in Charge having administrative jurisdiction of the office in which the case is pending shall direct.

It is further ordered that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the respondent

deported from the United States in the manner provided by law on the lodged charge only.

/s/ ROBERT S. DeMOULIN,
Special Inquiry Officer.

RSD:eg.

(Copy)

EXHIBIT B

U. S. Department of Justice
Board of Immigration Appeals

Jan. 20, 1956.

File: A5-468333.

In re: Jogindar Singh Clair a/k/a Hasin Brams.

In Deportation Proceedings

in Behalf of Respondent:

Boyd H. Reynolds, Attorney,
1014-8th Street,
Sacramento, California.

Charges:

Warrant: I & N Act—Entered without inspection.

Lodged: I & N Act—Act of 1924—No immigration visa.

Application: Suspension of deportation.

Detention Status: Released on bond.

This is an appeal from the order of the special inquiry officer finding the respondent deportable on

the ground that he was an immigrant without an immigration visa at the time of his entry on August 27, 1940, but granting voluntary departure.

The respondent is seeking suspension of deportation. This relief was denied by the special inquiry officer on two grounds. First, because the respondent came into the United States on an allied merchant vessel during the war, left his ship and did not engage in seaman service during the remainder of hostilities; and the second ground is that the respondent failed to show exceptional or extremely unusual hardship to anyone if he were deported.

Counsel takes issue with the second basis for denying suspension. Irrespective of this issue, on the first ground stated by the special inquiry officer we believe suspension of deportation is unwarranted.

Order: It is ordered that the appeal be dismissed.

CHAIRMAN.

[Endorsed]: Filed April 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, and answers the complaint herein as follows:

I.

Defendant admits the allegations of Paragraphs I, II, III, and IV of the complaint.

II.

Defendant alleges that the Board of Immigration Appeals has found not only that the plaintiff was not entitled to suspension of deportation on the grounds that he came into the United States on an allied merchant vessel during the war, that he left his ship and did not engage in seaman service during the remainder of hostilities, but also that he had failed to show exceptional or extreme hardship to anyone if he were deported.

III.

The defendant denies the allegations of Paragraph VIII and affirms that the proceedings in all respects were fair and constituted due process of law; that the findings were supported by substantial evidence; that the determinations were neither arbitrary nor unreasonable; and that the order of the agency was in accordance with statutory provisions and warranted by the facts.

Wherefore, the defendant prays that judgment be entered on behalf of the defendant and that he be granted his costs herein.

LLOYD H. BURKE,
United States Attorney,

By /s/ JAMES W. GRANT,
Special Assistant United
States Attorney.

A copy of the foregoing Answer was mailed this date to Robert B. McMillan, Esq., 625 Market Street, San Francisco, California, attorney for plaintiff.

Dated: May —, 1957.

/s/ JAMES W. GRANT.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Plaintiff Jogindar Singh Clair and Messrs. Phelan and Simmons, Mills Tower, San Francisco, California, attorneys for plaintiff.

Please take notice that on August 26, 1957, before Master Calendar Judge Louis E. Goodman, Room 258, United States Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California, at the hour of 9:30 a.m., or as soon thereafter as counsel may be heard, defendant herein will move the Court to submit the administrative action of defendant for review upon Complaint herein, the Answer of the defendant and the certified record of administrative proceedings of the Immigration and Naturalization Service.

Dated: August 20, 1957.

LLOYD H. BURKE,

United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

A copy of the foregoing Notice of Motion was mailed this date to Messrs. Phelan and Simmons, Mills Tower, San Francisco, California, attorneys for plaintiff.

Dated: August 20, 1957.

CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 20, 1957.

[Title of District Court and Cause.]

MINUTE ORDER—AUG. 30, 1957

This case came on regularly this day for submission. Ordered case continued to September 20, 1957, for submission.

[Title of District Court and Cause.]

MINUTE ORDER—SEPT. 20, 1957,

This case came on regularly this day for submission. Ordered case submitted on administrative record.

[Title of District Court and Cause.]

MEMORANDUM FOR JUDGMENT

Jogindar Singh Clair, hereinafter Clair, a citizen of India but a resident of the United States since

1940, has been found deportable on the ground that he was an immigrant without a visa at the time of his entry into the United States. In the course of his hearing, he applied for a suspension of deportation under Section 244 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(a)(1), but suspension was denied. Noting that Clair had entered the United States at Norfolk, Virginia, in 1940 after arriving there as a seaman aboard a British Flagship, the Special Inquiry Officer placed his denial on these grounds:

“It is to be noted that the respondent deserted an allied ship during a period when the United States was endeavoring to aid Great Britain during World War II and when every available seaman was sorely needed. The respondent has no close relatives in the United States, furthermore, he has presented no evidence which would show that deportation in his case would result in exceptional or extremely unusual hardship to anyone.”

Taking his case to the Board of Immigration Appeals, Clair contended that the evidence did not support the conclusion that there would be no unusual hardship; the Board ignored this contention however, ruling that the denial of relief could be upheld upon the first ground stated by the Special Inquiry Officer, paraphrased thusly:

“* * * the respondent came into the United States on an allied merchant vessel during the

war, left his ship and did not engage in seaman service during the remainder of hostilities;”

Clair then filed this action under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, contending that the ground relied upon by the Board was arbitrary, capricious, and an abuse of discretion; he asks that the order of deportation be set aside and that it be declared that he has a right to have his application for suspension be determined without reference to the fact that he arrived in the United States aboard a vessel of British registry.

The defendant answered, the matter was argued, and a certified copy of the administrative proceedings having been placed in the record, the matter was submitted to the Court for decision.

Much of plaintiff's argument endeavoring to show that the special hearing Officer and the Board were arbitrary is untenable. It is urged, for example, that the Board of Immigration Appeals, in saying that Clair came here on an "allied vessel during the war" is grossly in error, because the United States was not at war in 1940, and had no allies then. It is also assumed that the ground of refusal was only that Clair arrived here on a British vessel, instead of a ship of any other country. The Court has ignored all of this, for it is superficial and tenuous argument. The only point which concerns the Court is whether the Special Inquiry Officer and the Board were arbitrary in denying suspension of deportation to an alien because he deserted an allied vessel in 1940 and

did not engage in seaman service during the remainder of hostilities.

We are in an area where broad discretion has been conferred upon the administrative body. The statute says that "the Attorney General (of whom the Special Inquiry Officer and Board of Immigration Appeals are delegates) may, in his discretion, suspend deportation * * * "if the alien meets certain other requirements. (Emphasis added.) In *Jay v. Boyd*, 351 U. S. 345 (1956), this discretion was discussed. The Court said:

"It (the statute) does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi v. Shaughnessy* 347 U. S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace,' *Escoe v. Zerbst*, 295 U. S. 490, 492, and 'cannot be demanded as a right,' *Berman v. United States*, 302 U. S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole."

Congress having bestowed upon the Attorney General a grant of "unfettered" power, to be exercised

on the basis of such considerations as his sound discretion may dictate, it follows that only a very narrow scope of review is left to the Courts. It is not enough that the considerations or criteria employed by him or his delegates do not conclusively prove that the alien is undersirable; the question for the reviewing court is only whether the considerations used are palpably irrelevant or arbitrary. As declared by Judge Hand in *U. S., ex rel., Kaloudis v. Shaughnessy*, 2d Cir. 1950, 180 F. 2d 489, "The power of the Attorney General to suspend deportation * * * is a matter of grace, over which courts have now review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." " * * * unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review."

In the case at bar, the Court is unable to state that the Attorney General abused his discretion in denying suspension on the ground, among others, that the alien deserted a British ship in 1940, and did not engage in seaman service during the remainder of hostilities. The plaintiff has placed much reliance upon the case of *Mastrapasqua v. Shaughnessy*, 2d Cir., 1950, 180 F. 2d 999, where it was held to be an abuse of discretion to categorically deny suspension to all aliens whose presence in the United States was due solely to reasons connected

with the war. There is a substantial difference between that reason and the one given here. Here the reason for the denial is the activity of the alien in 1940 and through to 1945; here the Attorney General, in determining who should be the beneficiary of the sovereign grace, has decided not to dispense his power in favor of one who has demonstrated lack of sympathy for the cause espoused by the sovereign during World War II. Plainly, this reason cannot be said to be arbitrary or patently irrelevant.

Judgment is awarded to defendant. Counsel for defendant is directed to prepare and present findings, conclusions and a judgment in accordance herewith.

Dated: October 28, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed Oct. 28, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above action having come on regularly for hearing before the Honorable Oliver J. Carter, Judge of the above-entitled Court, Phelan and Simmons, attorneys-at-law appearing for plaintiff, and Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney

appearing for defendant, and the Court having on October 28, 1957, filed its Memorandum for Judgment therewith, does hereby make the following.

Findings of Fact and Conclusions of Law

I.

Plaintiff by his complaint seeks judicial review of the administrative proceedings as related to his application for suspension of deportation.

II.

Plaintiff entered the United States in 1940 as a seaman on shore leave. He was not in possession of a valid immigration visa.

III.

Plaintiff failed to depart from the United States in accordance with the conditions of his shore leave, but instead, deserted his ship and remained in the United States illegally.

IV.

Plaintiff has been found deportable on the ground that he is an immigrant not in possession of a valid unexpired immigration visa (Section 13 (a) 1924 Act) and therefore within one of the classes excludable by law at the time of entry (Sec. 241 (a) (1) 1952 Act).

V.

Plaintiff following his desertion and illegal entry did not engage in seaman service during World War II.

VI.

During the administrative proceedings plaintiff made application for suspension of deportation under Sec. 244 of the 1952 Act.

VII.

Plaintiff was at all times afforded due process and a fair hearing. In the exercise of the discretion vested in the Attorney General of the United States and delegated by regulation to the defendant and the Board of Immigration Appeals, the application for suspension of deportation was denied.

VIII.

In the disposition of plaintiff's application for suspension of deportation, defendant and the Board of Immigration Appeals have lawfully exercised the discretion contained in Sec. 244 of the 1952 Act.

Conclusions of Law

I.

Plaintiff is an alien illegally in the United States.

II.

The Order of defendant that plaintiff be deported is valid and legal.

III.

The denial of plaintiff's application for suspension is a valid exercise of the discretion contained in Section 244 of the Immigration and Naturalization Act of 1952.

IV.

Plaintiff is entitled to nothing by his complaint.

V.

Defendant is entitled to judgment dismissing the complaint and action and for his costs of suit.

Let judgment be entered accordingly.

Dated: November 29, 1957.

/s/ OLIVER J. CARTER,

United States District Judge.

A copy of the foregoing proposed Findings of Fact and Conclusions of Law was mailed this 7th day of November, 1957, to Robert B. McMillan, Esq., 625 Market Street, San Francisco, and to Phelan & Simmons, 1210 Mills Tower, San Francisco 4, California, as attorneys for plaintiff.

/s/ CHARLES ELMER COLLETT,

Assistant United States Attorney.

[Endorsed]: Filed Nov. 29, 1957.

In the United States District Court for the Northern
District of California, Southern Division

Civil No. 36388

JOGINDAR SING CLAIR,

Plaintiff,

vs.

BRUCE G. BARBER as District Director, Immi-
gration and Naturalization Service, San Fran-
cisco District,

Defendants.

JUDGMENT

The above matter having been heard by the Hon-
orable Oliver J. Carter, Judge of the above-entitled
Court, and the Court in accordance with its Memo-
randum for Judgment, filed October 28, 1957, hav-
ing also filed its Findings of Fact and Conclusions
of Law, now, therefore,

It is Hereby Ordered, Adjudged and Decreed that
plaintiff is entitled to no relief by his complaint
herein, and said complaint and action are hereby
dismissed; defendant to have judgment for his costs
in the sum of \$20.00.

Dated: November 29, 1957.

/s/ OLIVER J. CARTER,

United States District Judge.

A copy of the foregoing proposed Judgment was
mailed this date to Robert B. McMillan, Esq., 625

Market Street, San Francisco, California, and to Phelan & Simmons, 1210 Mills Tower, San Francisco 4, California, as attorneys for plaintiff.

Dated: November 29, 1957.

CHARLES ELMER COLLETT,
Assistant United States At-
torney.

Lodged Nov. 7, 1957.

[Endorsed]: Filed Nov. 29, 1957.

Entered: Nov. 29, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Jogindar Singh Clair, plaintiff herein, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in the above-entitled action against plaintiff and in favor of defendant which said judgment was entered in this action on November 29, 1957.

Dated: December 10, 1957.

ROBERT B. McMILLAN,
PHELAN & SIMMONS,
Attorneys for Plaintiff.

By /s/ ARTHUR J. PHELAN.

Certificate of Service attached.

[Endorsed]: Filed Dec. 10, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the Plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit from the judgment of this court entered

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-entitled Court, may proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of Section 73C of the Federal Rules of Civil Procedure.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Jogindar Singh Clair, plaintiff herein, designates the portions of the record, proceedings, and evidence to be contained in the record of appeal, as follows:

1. Complaint (including the exhibits thereto and made a part thereof);
2. Answer;
3. Defendant's Notice of Motion, dated August 20, 1957;
4. Minute Order of August 30, 1957, re Submission of Cause;
5. Minute Order of September 20, 1957, re Submission of Cause;
6. Memorandum for Judgment filed October 28, 1957;
7. Findings of Fact and Conclusions of Law;
8. Judgment;
9. Notice of Appeal;
10. Designation of Contents of Record on Appeal.
11. Certified Immigration Record.

Dated: December 20, 1957.

ROBERT B. McMILLAN,
PHELAN & SIMMONS,
Attorneys for Plaintiff;

By /s/ ARTHUR J. PHELAN.

Service admitted.

[Endorsed]: Filed Dec. 20, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the appellant:

Excerpt from Docket Entries.

Complaint.

Answer.

Notice of Motion to Submit Case on Administrative Record.

Minute Order Continuing Case for Submission.

Minute Order Submitting Case.

Memorandum for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Designation of Record on Appeal.

Defendant's Exhibit A—Certified Record from Immigration and Naturalization Service.

In the United States Court of Appeals
for the Ninth Circuit

No. 15841

JOGINDAR SINGH CLAIR,

Appellant,

vs.

BRUCE G. BARBER, as District Director of Im-
migration and Naturalization Service, San
Francisco District,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

Appellant, through his undersigned attorneys, submits the following statement of points on which he intends to rely on appeal in this cause:

I.

The District Court erred in holding that the administrative denial of appellant's application for suspension of deportation was a valid exercise of the discretion contained in section 244 of the Immigration and Nationality Act (8 U.S.C. 1254).

II.

The District Court erred in holding that appellant was afforded due process and a fair hearing on his application for suspension of deportation.

III.

The District Court erred in holding that appellee and the Board of Immigration Appeals lawfully

exercised their discretion in denying appellant's application for suspension of deportation on the sole ground that appellant came into the United States on an allied merchant vessel during the war, left his ship, and did not engage in seaman service during the remainder of hostilities.

IV.

The District Court erred in entering judgment that the complaint and action be dismissed.

Dated: January 16, 1958.

ROBERT B. McMILLAN,
PHELAN & SIMMONS,
Attorneys for Appellant;

By /s/ ARTHUR J. PHELAN.

Copies mailed.

[Endorsed]: Filed Jan. 16, 1958.

No. 15,841

IN THE

United States Court of Appeals
For the Ninth Circuit

JOGINDAR SINGH CLAIR,

Appellant,

vs.

BRUCE G. BARBER, as District Director,
Immigration and Naturalization Service,
San Francisco District,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

APPELLANT'S REPLY BRIEF.

ROBERT B. McMILLAN,

625 Market Street,

San Francisco 5, California,

PHELAN & SIMMONS,

ARTHUR J. PHELAN,

MILTON T. SIMMONS,

1210 Mills Tower,

San Francisco 4, California,

Attorneys for Appellant.

FILED
MAY 1950
PAUL P. O'BRIEN, C.

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No. 15,841

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOGINDAR SINGH CLAIR,

Appellant,

VS.

BRUCE G. BARBER, as District Director,
Immigration and Naturalization Service,
San Francisco District,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California.**

APPELLANT'S REPLY BRIEF.

Appellee contends that the discretion of the Board of Immigration Appeals to deny suspension of deportation is not reviewable. Appellant contends that it is reviewable if abuse of discretion or arbitrary action is involved.

Appellee relies principally upon the following decisions:

Kaloudis v. Shaughnessy, (C.A. 2) 180 F. 2d 489;

Wolf v. Boyd, (C.A. 9) 238 F. 2d 249 (cert. den. 353 U.S. 936);

Jay v. Boyd, 351 U.S. 345, 76 S.Ct. 919, 100 L. Ed. 1242;

Hintopoulos v. Shaughnessy, (C.A. 2) 233 F. 2d 705, affirmed 353 U.S. 72, 77 S.Ct. 618, 1 L.Ed 2d 652.

In those cases the Courts found that the administrative discretion had not been abused, that the administrative action had not been arbitrary or capricious and that it had not been actuated by irrelevant considerations. In each of those cases, the language of the opinion indicates that the result would have been otherwise if arbitrary action or abuse of discretion had been found. For example, in *Wolf v. Boyd*, *supra*, this Court said at page 254:

“As Judge Frank of the Second Circuit in the Adel case said:

‘The courts cannot review the exercise of such discretion, they can interfere *only when there has been a clear abuse of discretion or a clear failure to exercise discretion.*’ *U.S. ex rel Adel v. Shaughnessy*, 1950, 183 F.2d 371, 372.” (Italics added.)

This Court in the *Wolf* case, *supra*, also quoted the following from the opinion of Judge Hand in the *Kaloudis* case, *supra*:

“We will assume *arguendo* that the contrary might appear; i.e., that the reason given might have been so clearly irrelevant that a court could say that the Attorney General had transgressed the statute,”

Both the *Wolf* case and the *Kaloudis* case involved membership in proscribed organizations. There is

nothing in either decision which would conflict with the principle laid down in the case of *Mastrapasqua v. Shaughnessy*, (C.A. 2) 180 F. 2d 999, wherein the Court of Appeals for the Second Circuit held that the Board abused its discretion in denying suspension of deportation on the sole ground that the alien's entry into the United States in 1940 had been due to war-time events, because the classification was arbitrary and unreasonable. Throughout the opinions in the *Wolf* case and the *Kaloudis* case, supra, are expressions recognizing that denial of discretionary relief on grounds which are arbitrary or capricious constitutes an abuse of discretion which is reviewable by the Courts. This is again clear from the following additional statement of this Court in the *Wolf* case, supra:

“Further, the courts have no reviewing power under claim of due process of law *unless the denial of discretionary relief was arbitrary.*” (Italics added.)

In *Jay v. Boyd*, supra, (a case also involving membership in proscribed organizations), the Supreme Court construed the statute as permitting decisions based on matters outside the administrative record “at least when such action would be *reasonable.*” In that case, the Supreme Court found that the regulations permitting use of confidential information where disclosure would be prejudicial to the public interest, safety or welfare was “a *reasonable* class of cases in which to exercise that power.” Thus again the Court applied the test of reasonableness of classification in determining the propriety of the administrative action.

Appellee also places strong reliance on the decision of the Court of Appeals in the case of *Hintopoulos v. Shaughnessy*, supra, but the decision of the Court of Appeals in that case contained the following language:

“Only if the discretion is shown to have been formulated on arbitrary or illegal considerations, may the courts interfere” (p. 708).

The same exception was recognized in the decision of the Supreme Court in the *Hintopoulos* case, since in that case the Court specifically stated:

“Nor can we say that it was abuse of discretion to withhold relief in this case. The reasons relied on by the hearing officer and the Board—namely, the fact that petitioners had established no roots or ties in this country—were *neither capricious nor arbitrary.*” (Italics added.)

Here again is recognition that where there is abuse of discretion or arbitrary and capricious action, the administrative decision may be subject to judicial review. Thus there is nothing in the *Hintopoulos* opinion inconsistent with the *Mastrapasqua* decision, supra.

In the case at bar, like the *Mastrapasqua* case, supra, the Board has endeavored to set up an arbitrary classification of persons to whom discretionary relief will not be granted. This classification is aimed solely at aliens who arrived as seamen; it is limited to those who at the time of arrival were employed on ships registered to some country which *later* became a cobelligerent of the United States in World War II; the classification does not include aliens who came as

stowaways, transits, visitors, or border jumpers, nor does it include seamen who arrived on neutral, German, or Italian ships. The failure to perform further sea service in World War II is made the basic consideration for denial of the discretionary relief, and no cognizance is taken of the fact that the appellant registered in the United States for Selective Service and was subject to such service, military or civilian, which the United States may have chosen to require of him. We submit that this classification is fully as arbitrary and capricious as was the classification involved in the *Mastrapasqua* case, supra. In the last-mentioned case, the Board said in effect "We will not grant him relief because he arrived on an Italian ship and did not depart because of war-time conditions;" in the case at bar, the Board in effect says "We will not grant him relief because he arrived on a British ship and did not continue to serve further as a seaman." In principle, the situations are the same. The consideration invoked by the Board in the one case is just as remote from the relevant factors pertaining to the relief of suspension of deportation as it is in the other. Unless it can be said that denial of suspension of deportation cannot be reviewed even if based upon an arbitrary classification, we submit that the case should be remanded to the immigration authorities for decision of the application upon its merits as this Court did in *Barber v. Lal Singh*, 247 F. 2d 213.

CONCLUSION.

We respectfully submit that to deny suspension of deportation on the sole basis that the person arrived as a seaman in 1940 and did not thereafter perform sea service constitutes abuse of discretion and arbitrary and capricious action, that by the imposition of an unreasonable classification appellant has been denied discretionary consideration on his application on its merits and that under the principles of the *Mastrapasqua* and *Lal Singh* decisions, supra, the matter should be remanded to the administrative authorities for consideration of the application for suspension of deportation without regard to the consideration upon which it has heretofore been rejected by the Board.

We respectfully submit that the decision of the Court below is erroneous and should be reversed.

Dated, San Francisco, California,

May 7, 1958.

ROBERT B. McMILLAN,
PHELAN & SIMMONS,
ARTHUR J. PHELAN,
MILTON T. SIMMONS,

Attorneys for Appellant.

No. 15,841

IN THE

United States Court of Appeals
For the Ninth Circuit

JOGINDAR SINGH CLAIR,

Appellant,

VS.

BRUCE G. BARBER, as District Director,
Immigration and Naturalization Service,
San Francisco District,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF OF APPELLEE.

LLOYD H. BURKE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,

Attorneys for Appellee.

FILED

APR 22 1958

PAUL P. O'BRIEN, CLERK

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No. 15,841

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOGINDAR SINGH CLAIR,

Appellant,

VS.

BRUCE G. BARBER, as District Director,
Immigration and Naturalization Service,
San Francisco District,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California.**

BRIEF OF APPELLEE.

JURISDICTION.

Appellant by his complaint herein sought judicial review of the administrative disposition of his application for suspension of deportation. Traditionally, habeas corpus was the remedy whereby such relief was sought.

Jay v. Boyd, 351 U.S. 345;

Hintopoulos v. Shaughnessy, 353 U.S. 72.

The Supreme Court has approved the declaratory judgment action, 28 U.S.C. 2201, as proper to obtain

a judicial determination of eligibility for the exercise of the discretion.

McGrath v. Kristensen, 340 U.S. 162;

Ceballos v. Shaughnessy, 352 U.S. 599.

Ceballos is also authority for the proposition that the Attorney General is not an indispensable party, following *Shaughnessy v. Pedreiro*, 349 U.S. 48.

To the extent that the exercise of discretion may be reviewed, it would appear the same relief may be obtained by habeas corpus or by a complaint for review and declaratory relief.

Crain v. Boyd, 237 F. 2d 927;

Brownell v. Tom We Shung, 352 U.S. 180;

Leonard Cruz-Sanchez v. Robinson, 249 F. 2d 771;

Rystad v. Boyd, 246 F. 2d 246, cert. den. 1-7-58, 355 U.S. 912;

Wolf v. Boyd, 238 F. 2d 249, cert. den. 4-13-57, 353 U.S. 936.

STATEMENT OF THE CASE.

Appellant, a citizen of India, entered the United States on August 27, 1940, as a seaman on shore leave. He was then a member of the crew of a vessel of British registry. He failed to return to the vessel and has remained in the United States unlawfully since August 27, 1940. He has been found deportable on the ground that he was an immigrant without a visa at the time of his entry into the United States. His deportability on this ground is not challenged.

In the course of his hearing he made application for suspension of deportation under Section 244(a)(1) of the 1952 Immigration and Nationality Act (8 U.S.C. 1254(a)(1)). The special inquiry officer denied the application with the following statement:

“It is to be noted that the respondent deserted an allied ship during a period when the United States was endeavoring to aid Great Britain during World War II and when every available seaman was sorely needed.”

On appeal, the Board of Immigration Appeals restated the statement of the special inquiry officer as follows:

“This relief was denied by the Special Inquiry Officer . . . because the respondent came into the United States on an allied merchant vessel during the war, left his ship and did not engage in seaman service during the remainder of hostilities.”

STATUTES.

Section 244(a)(1) Immigration and Nationality Act of 1952. (8 U.S.C. 1254(a)(1)).

“Sec. 244(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

(1) Applies to the Attorney General within five years after the effective date of this chapter for suspension of deportation; last entered the United States more than two years prior to June

27, 1952; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; . . .”

* * *

Section 244(b), Immigration and Nationality Act of 1952. (8 U.S.C. 1254(b)).

“(b) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraphs (1), (2), or (3) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which

a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If neither the Senate nor the House of Representatives shall, within the time above specified, pass such a resolution, the Attorney General shall cancel deportation proceedings. The provisions of this subsection relating to the granting of suspension of deportation shall not be applicable to any alien who is a native of any country contiguous to the United States or of any adjacent island, unless he establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa."

QUESTION.

Is the exercise of discretion by the Board of Immigration Appeals subject to judicial review?

ARGUMENT.

THE BOARD OF IMMIGRATION APPEALS HAS PROPERLY EXERCISED THE DISCRETION REQUIRED BY SECTION 244 (a)(1), AND ITS DECISION MAY NOT BE REVIEWED.

Appellee does not accept the proposition asserted by appellant as "the clear tenor of the decided cases".

The decided cases to which he refers include the following:

Kaloudis v. Shaughnessy (2 Cir.), 180 F. 2d 489;

Wolf v. Boyd (9 Cir.), 238 F. 2d 249, cert. den. 4-23-57, 353 U.S. 936;

Jay v. Boyd, 351 U.S. 345;

Hintopoulos v. Shaughnessy (2 Cir.), 233 F. 2d 705, affirmed 353 U.S. 72.

The opinion in the *Kaloudis* case was written by Chief Judge Learned Hand of the Second Circuit with the concurrence of Judges Swan and Chase. In *Wolf v. Boyd* of this Court, the opinion was written by Judge Barnes. Chief Judge Denman and Judge Bone joined without dissent.

The opinion in the *Wolf* case, pages 254-255, embraces a substantial portion of the opinion in the *Kaloudis* case by quotation. The following portions of the quotation are noted:

“The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate. . . . and, if the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the ‘exercise of discretion’, which we have again and again declared that we will not review.

... The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. . . .”

In *Jay v. Boyd* (supra), the Supreme Court on page 354, footnote 16, quoted the following from Judge Hand's opinion in *Kaloudis*:

“As stated by Judge Learned Hand, ‘The power of the Attorney General to suspend the deportation is a dispensing power like a Judge's power to suspend the execution of a sentence, or the President's to pardon a convict.’ ”

From the same page (354) of the *Jay* case, the following was quoted in the opinion of the Court below (Tr. p. 21):

“It (the statute) does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised, although such aliens have been given a right to a discretionary determination on an application for suspension. Cf. *Accardi v. Shaughnessy*, 347 U.S. 260, a grant thereof is manifestly not a matter of right, under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it ‘comes as an act of grace’, *Escoe v. Zerbst*, 295 U.S. 490, 492, and ‘cannot be demanded as a right’, *Berman v. U. S.*, 302 U.S. 211, 213, and this unfettered discretion of the Attorney Gen-

eral with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole."

Appellant here relies heavily upon the Second Circuit Court of Appeals' opinion in *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999, decided about two weeks after *Kaloudis*. The panel of judges consisted of Augustus N. Hand, Chase and Frank. Judge Frank wrote the opinion of the Court. *Mastrapasqua's* application for suspension of deportation had been denied by the Board of Immigration Appeals in the following language:

"The case is one squarely within the terms of the decision of the Attorney General in the *Lagamarsino* case and accordingly he cannot be granted the privilege of applying for suspension of deportation. The motion must therefore be denied." (p. 1001)

In the *Lagamarsino* case the Attorney General refused to legalize *Lagamarsino's* residence in that he was a seaman whose presence in the United States was the result of conditions arising out of World War II. Judge Frank (p. 1003) concluded:

". . . It seems clear that the Attorney General was acting in accordance with a 'policy' of refusing to consider whether or not to give discretionary relief of pre-examination to any persons coming within a fixed category, i.e.—those whose presence in the United States is due solely to war. It is also clear that the Board felt constrained by the *Lagamarsino* decision to apply the 'policy' based on this classification to *Mastrapasqua's* re-

quests for first pre-examination, and later suspension of deportation.”

The case was remanded to the Immigration and Naturalization Service to exercise discretion.

Cf. *Accardi v. Shaughnessy*, 347 U.S. 260;

Shaughnessy v. Accardi, 349 U.S. 280.

Appellant's position in reliance on *Mastrapasqua* is somewhat akin to Judge Frank's dissent in *Hintopoulos v. Shaughnessy*, 233 F. 2d 705, 709. The majority opinion written by Judge Hincks, concurred in by Judge Waterman, distinguished *Mastrapasqua* as a case in which the Board had failed or refused to exercise its discretion. In *Hintopoulos*, the Board had found him (Hintopoulos) eligible and “in the exercise of its discretion it denied the suspension applied for.” (p. 708.) The Court then held that in its broad power in the formulation of its discretion the Board might properly take into account, among other factors, its concept of congressional policy as manifested in the 1952 Act. In so doing it relied on *Kaloudis v. Shaughnessy* (supra).

Judge Frank in his dissent pointed out that his “colleagues lean heavily on *United States ex rel Kaloudis v. Shaughnessy*.” His position was that *Hintopoulos* was like *Mastrapasqua*.

The Supreme Court affirmed the majority opinion in *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72. The Court said, page 77:

“The Board found that petitioners met these standards and were eligible for relief. But the

statute does not contemplate that all aliens who meet the minimum legal standard will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility. Discretion must be exercised even though statutory prerequisites have been met.”

United States ex rel. Kaloudis v. Shaughnessy,
180 F. 2d 489;

United States ex rel. Adel v. Shaughnessy, 183
F. 2d 371;

Cf. *Jay v. Boyd*, 351 U.S. 345.

CONCLUSION.

It appears clearly in the case at bar that the appellee and the Board of Immigration Appeals have exercised the discretion vested in the Attorney General under Section 244 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1254(a)(1)) and have denied to appellant the relief sought by his application for suspension.

The position of appellant, a seaman, who entered the United States on shore leave as a member of the crew of a British vessel in 1940, who thereupon deserted his ship and remained in the United States illegally, who thereafter “did not engage in seaman service during the remainder of hostilities” constitutes a sufficient reason on its face, in the exercise of the discretionary function, to deny the application.

It is respectfully submitted that in a valid exercise of the discretion contained in Section 244, the application of appellant was denied. The judgment of the District Court should be affirmed.

Dated, April 3, 1958.

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No. 15862.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BYRON BORGEN,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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No. 15862.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

BYRON BORGEN,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of Case.

Appellee must respectfully disagree with appellant's statement of facts in the following particulars:

First, appellant did not establish the method of preparation of the surface of the forecastle head of the DAVID E. DAY as he states in his brief (Br. p. 3). The appellant described the surface as painted with DeVoe deck red enamel. However, at the trial, Exhibit 4, "a piece of plate, which has been cleaned, wire-brushed, and given two coats of red lead and one coat of DeVoe and Raynolds deck red marine lead" [Tr. 58], was identified by appellant as truly representing the condition of the deck of the DAVID E. DAY [Tr. 169]. The only other witness as to

the composition of the deck surface, Mr. Swegarden, stated he did not recall the name of the paint employed but "believed" it was DeVoe deck red *enamel* [Tr. 12].

Second, appellant states that the customary practice in the maritime industry at the time of this accident with respect to the preparation of the forecastle heads of T-2 type tankers was to sprinkle sand on the surface coat of ordinary deck paint before it dried; or, alternatively, to paint the deck with commercial non-skid paint which contained an abrasive substance (Br. p. 5). However, appellant's witness, Captain Ernest F. Hanson, named only two non-naval, T-2 vessels, the D. J. MORAN [Tr. 71] and the W. M. IRISH [Tr. 70] on which he had sailed as master or mate on which the sand technique was used. Further, Captain Hanson stated that, on the D. J. MORAN, a tar product, "Bitumastic", was used on the main deck and that this substance was very slippery when wet and cold [Tr. 71]. He had never been on a vessel on which any commercial non-skid paint had been used [Tr. 74]. He stated that on Keystone Tankship Company's BUNKER HILL no sand or non-skid paint was used [Tr. 72]. He had no familiarity with the Union Oil Company practice [72]. Another commercial operator, Tidewater Associated, he stated, used "Bitumastic" on the main deck; a substance which admittedly became slippery when wet and cold [Tr. 73]. He had no knowledge as to what was used on their forecastle heads.

Witness Frank A. Amacisca, named only two non-naval vessels on which sand was used, the CELILO and TONTO

[Tr. 105]. On the former the mate whom he relieved had not used sand on the forecastle [Tr. 102]. Apparently, his only experience with commercial non-skid paint was upon the naval vessel MILACONA [Tr. 105].

The third witness, Edward Lee Wheeler, named only three commercial T-2 tankers on which he had served as a licensed officer on which sand was used on the final coat on the forecastle head, the CHERRY VALLEY [Tr. 135], the FORT CHARLOTTE [Tr. 141] and the SHAWNEE TRAIL [Tr. 155]. His only experience with non-skid paint was aboard the SHAWNEE TRAIL when five gallons or so had been sent down to the vessel for experimental use [Tr. 146].

It is submitted that this evidence was insufficient to establish the custom or usage in the maritime industry.

In addition, appellant has set forth no facts to establish any causal connection between the manner of preparing or maintaining the forecastle deck of the DAVID E. DAY and his fall of November 11, 1955.

ARGUMENT OF THE CASE.

THE COURT BELOW DID NOT ERR IN GRANTING THE APPELLEE'S MOTION FOR DISMISSAL OF THE APPELLANT'S ACTION.

I.

The Court Below Possessed the Power to Dismiss a Cause of Action Under the Jones Act and a Cause of Action Based on Unseaworthiness if the Appellant Had Shown No Right to Relief Upon the Facts and the Law.

Pursuant to Rule 41(b), Federal Rules of Civil Procedure, a court may dismiss an action after the plaintiff has completed the presentation of his evidence on the ground that upon the facts and the law plaintiff has shown no right to relief.

This power of the court extends to action under the Jones Act and to actions based on unseaworthiness. (See *Freitas v. Pacific Atlantic Steamship Company*, 218 F. 2d 562 (9th Cir., 1955); *Lake v. Standard Fruit and Steamship Company*, 185 F. 2d 354 (2d Cir., 1950); *Berk v. Mathiason Shipping Co.*, 45 Fed. Supp. 851 (S. D. N. Y., 1942).)

II.

The Appellant Showed No Right to Relief Under the Jones Act or on a Theory of Unseaworthiness.

- A. In Order for the Appellant to Show a Right to Relief Under the Jones Act He Must Have Shown That the Appellee Was Negligent and That Such Negligence Was a Proximate Cause of His Injury.

The doctrine has often been reiterated by the courts that the basis of recovery under the Jones Act is negligence of the shipowner which is a proximate cause of the injury to the seaman.

This doctrine was clearly set out in *Buford v. Cleveland & Buffalo Steamship Company*, 192 F. 2d 196 (7th Cir., 1951), where the court stated, at page 198:

“However, it is also fundamental that, under the Jones Act, damages may only be recovered for negligence (cases cited), and that a causal relationship must exist between the negligence and the injury. The burden of proof was upon the libellant here to establish by evidence that the respondent was guilty of negligence proximately causing the injury complained of.”

See, *DeZon v. American President Lines*, 318 U. S. 660 (1943); *Schulz v. Pennsylvania Railway Company*, 350 U. S. 523 (1956); *Jackson v. Pittsburgh S.S. Co.*, 131 F. 2d 668 (6th Cir., 1942); *Lake v. Standard Fruit and Steamship Company*, *supra*; *Williams v. Tidewater Associated Oil Company*, 227 F. 2d 791 (9th Cir., 1955); *Harris v. Whiteman*, 243 F. 2d 563 (5th Cir., 1957).

In the *DeZon* case, the Supreme Court, in affirming a verdict directed against a seaman in a case under the Jones Act, held that there was insufficient evidence of negligence to give to the jury, and said, at page 660,

“damages may be recovered under the Jones Act *only for negligence.*” (Emphasis added.)

The *Lake* case involved an appeal by a seaman from an order dismissing his action under the Jones Act after the evidence was in. In affirming the dismissal the United States Court of Appeals stated, at page 356:

“It is, of course, settled that damages may be recovered under the Jones Act only for negligence,”

and, at page 357:

“We recognize that juries are given and should be given a wide scope in determining all questions of fact. But when it appears, as here, that involved are only ‘the obvious and well-known risks of the business’ then there is an absence of negligence in law and that case will not be left to the jury.”

In the *Harris* case, 243 F. 2d at 565, the court stated:

“We think it important again to point out that recovery under the Jones Act is dependent upon proof of negligence having a causal effect on the injuries suffered by a seaman.”

B. In Order for the Appellant to Have Shown a Right to Relief for Unseaworthiness He Must Have Shown That an Unseaworthy Condition Existed and That Such Condition Was a Proximate Cause of His Injury.

The burden is on the plaintiff to show the existence of an unseaworthy condition. (See, *Grillo v. United States*, 177 F. 2d 904 (2d Cir., 1949); *Huber v. American President Lines*, 240 F. 2d 778 (2d Cir., 1957); *Olson v. The Patricia Ann*, 152 Fed. Supp. 315 (E. D. N. Y., 1957).)

That this doctrine applies in this Circuit was made clear by *Freitas v. Pacific Atlantic Steamship Company*,

supra, in which decision this court affirmed an order of the court below granting the defendant's motion to dismiss the plaintiff's action on the grounds that he failed to show the existence of an unseaworthy condition.

It is likewise incumbent upon the plaintiff to show a causal connection between the unseaworthy condition and his injury. Thus the court in *Mahnich v. Southern Steamship Company*, 321 U. S. 96, 99 (1943), stated:

“The vessel and the owner are liable to indemnify a seaman for injury *caused* by unseaworthiness.” (Emphasis added.)

In *Crawford v. Pope & Talbot Inc.*, 206 F. 2d 784, 789 (3rd Cir., 1953), the court stated:

“Ever since the *Osceola*, 1903, 189 U. S. 158, 23 S. Ct. 483, 487, 47 L. Ed. 760, it has been the law that the vessel and her owner are * * * liable to an indemnity for injuries received by seamen *in consequence of* the unseaworthiness of the ship * * *” (Emphasis added.)

See: *Balada v. Lykes Brothers Steamship Co.*, 179 F. 2d 943 (2d Cir., 1950); *Grillea v. United States*, 229 F. 2d 687 (2d Cir., 1956); *Peterson v. United States*, 224 F. 2d 748 (9th Cir., 1955); *Quintin v. Sprague Steamship Co.*, 149 Fed. Supp. 226 (S. D. N. Y., 1957); *Alson v. United States*, 150 Fed. Supp. 308 (S. D. N. Y., 1957).

C. The Appellant Failed to Produce Evidence Upon Which a Jury Could Properly Proceed to Find That the Appellee Was Negligent.

To recover for negligence appellant was required to establish by competent evidence that the appellee breached a duty of care owed to the appellant, and that such

breach was a proximate cause of the appellant's fall. The breach of duty could have been shown either by showing that it was reasonably foreseeable to the appellee that injury would occur to the appellant if the appellee proceeded to maintain the deck on the forecastle of the DAVID E. DAY as it was doing, or by showing that a standard of care had been established in the industry, and that appellee failed to meet this standard.

Appellant made no attempt to prove that appellee could reasonably foresee the possibility of harm to the appellant if it continued to maintain the deck on the forecastle of the DAVID E. DAY as it did. However, an attempt was made by appellant to establish a custom or usage in the maritime industry which was contrary to the appellee's practice. It was claimed that the maritime industry in November of 1955 had adopted the practice with respect to T-2 type tankers of using "non-skid" paint or scattering sand in the surface coat of ordinary paint before it dried. With respect to the employment of "non-skid" paint, two of appellant's experts had no experience with such paint, Hanson [Tr. 74] and Amacisca [Tr. 90]. The third expert, Wheeler, had had experience with only five gallons or so of a non-skid paint which had been sent him for experimental purposes [Tr. 146]. All three of the gentlemen testified that they used sand on the surface coat of ordinary paint on the forecastle heads of T-2 tankers. However, their testimony fell far short of showing an industry practice with respect to commercially operated T-2 tankers by which a standard of care could be found to have been established. Witness Hanson named only two non-naval vessels, Mr. Amacisca two, and Mr. Wheeler three which used the sand method of deck preparation.

“The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant’s motion should have been granted.” (*Gunning v. Cooley*, 281 U. S. 90, 94 (1930).)

It is submitted that the appellant failed to present evidence sufficient to support his burden of proving negligence on the part of the appellee. In *Butte Copper & Zinc Co. v. Amerman*, 157 F. 2d 457 (9th Cir., 1946), this court held it error to direct a verdict against a party if there was *substantial* evidence in his favor. At page 458, this court stated:

“Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

D. The Appellant Failed to Produce Evidence Upon Which a Jury Could Properly Proceed to Find an Unseaworthy Condition Existed.

In describing the duty of a shipowner to furnish a seaworthy vessel, the Court in *Doucette v. Vincent*, 194 F. 2d 834, 837-838 (1st Cir., 1952), said:

“Nor is perfection required of shipowners by the maritime law of unseaworthiness, for generally stated it is the shipowner’s duty under that law to provide a vessel sufficient, that is reasonably adequate, in materials, construction, equipment, stores, officers, men and outfit for the trade or service in which the vessel is employed.”

In that case, a seaman was injured when a snatchblock opened causing him to become entangled in a loop of line. The plaintiff in that case, like the appellant here, attempted to prove the existence of an unseaworthy condition by

offering evidence of a better, safer device. The Court stated at page 838 of its opinion:

“But if the vessel and equipment, including the snatchblock here supplied were reasonably safe and suitable, the shipowner’s obligation was performed, even though there may have been some other type of snatchblock more modern or more perfect in some detail.”

So here, if the vessel and equipment including the deck on the forecastle of the DAVID E. DAY were reasonably safe and suitable, the shipowner’s obligation was performed, even though there may have been some other method of maintaining the deck more modern or more perfect in some detail.

The instant case is even more extreme, for no evidence was offered to show that the deck of the DAVID D. DAY, as maintained, was not reasonably safe. There was no evidence that the use of sand or of non-skid paint, as suggested by plaintiff, would have rendered the deck any more safe.

The Court here is asked to infer, from testimony that some ships use sand in their paint, and that a “non-skid” paint is manufactured, that the use of sand or such paint is safer than the method used aboard the DAVID E. DAY. Having made this inference, it is to be used as a basis for a further inference, already discredited by the cases, that the appellee failed to provide a seaworthy vessel by failing to use sand or “non-skid” paint.

No evidence was offered to show that the DAVID E. DAY was not reasonably adequate for the trade or service in which it was employed. No evidence was offered

to show that the DAVID E. DAY was not reasonably safe. No evidence was offered upon which it could properly be inferred that the DAVID E. DAY was not reasonably adequate or safe.

In the absence of evidence to support the appellant's allegation of unseaworthiness the Court below was correct in dismissing the action and should not be overruled here. (See *Bertha Building Corporation v. National Theatres Corporation*, 248 F. 2d 833 (2d Cir., 1957); *Franks v. Groendyke Transport*, 229 F. 2d 731 (10th Cir., 1956); *Simpson v. Continental Grain Company*, 199 F. 2d 284 (8th Cir., 1952).)

E. The Appellant Failed to Produce Evidence Upon Which a Jury Could Properly Proceed to Find That His Fall Was the Proximate Result of Either Negligence on the Part of the Appellee or the Existence of an Unseaworthy Condition.

In addition, appellant failed to produce substantial evidence that the alleged failure of the appellee to use sand or non-skid paint on the deck of the DAVID E. DAY was the cause in fact or a proximate cause of the appellant's fall.

Appellant failed to produce evidence sufficient to give to the jury that, had the appellee used sand or non-skid paint, the subject accident would not have occurred.

“It is not sufficient to show a set of circumstances bringing the theory of appellants within the realm of possibilities, nor can the theory itself furnish the deficiency; the evidence must bring the theory to the level and dignity of a probable cause.” (*Ralston Purina Company v. Edmunds*, 241 F. 2d 164, 168 (4th Cir., 1957).)

Appellant's evidence established only that the paint used on the DAVID E. DAY was regular deck enamel [Tr. 169], which resulted in a smooth and semi-gloss surface [Tr. 13]. There was no evidence showing that this finish actually had any lower a coefficient of friction under the weather conditions prevailing at the time of the accident than did the so-called "non-skid" paint or ordinary paint sprinkled with sand which appellant claims should have been used.

"In determining whether there is sufficient evidence to take the case to the jury, a federal judge performs a judicial function and is not a mere automaton. He must determine, 'not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it.' The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict." (*Reuter v. Eastern Airlines*, 226 F. 2d 443 (5th Cir. 1955).)

Respectfully submitted,

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